

(21,167.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 159.

THE CITY OF OMAHA, PETITIONER,

vs.

OMAHA WATER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

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a (CERTIFIED TRANSCRIPT OF RECORD.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA, Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Filed August 10, 1907.

1 Pleas, before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, and sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the April, 1907 Term thereof.

Be it remembered, that on the 9th day of July, 1906, Bill in Equity was filed in the Clerk's office of said Circuit Court, which said Bill in Equity is in words and figures following to-wit:

In the Circuit Court of the United States, Eighth Judicial Circuit, for the District of Nebraska. In Equity.

OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska:

The Omaha Water Company, a corporation duly organized under the laws of the State of Maine, and a citizen of the State of Maine, brings this its bill of complaint against the City of Omaha, a municipal corporation organized as a metropolitan city under the laws of the State of Nebraska, and a citizen of the State of Nebraska, and an inhabitant of the District of Nebraska, and thereupon your orator complains and says:

That the matter and amount in dispute in this action exceeds the sum and value of \$2,000.00 exclusive of interest and costs.

That the plaintiff, the Omaha Water Company, was and is a corporation duly organized and existing under the laws of the State of Maine, and is a citizen of the State of Maine.

That the said defendant, the City of Omaha, is a municipal corporation organized under the laws of the State of Nebraska as a city of the metropolitan class.

That the said City of Omaha is a citizen of the State of Nebraska, and is an inhabitant of the District of Nebraska.

Your orator shows to this Honorable Court that in the year 1880 the city of Omaha was a municipal corporation organized under the laws of the State of Nebraska as a city of the first class, and under

the provisions of the act of the Legislature of the State of
2 Nebraska, being an act approved February 27th, 1879, entitled: An Act to amend Section 17 of the Act entitled an Act to incorporate cities of the first class, approved March 28th, 1873, the Mayor and Council of the said city of Omaha were given power to erect, construct and maintain water works, either within or without the City of Omaha, and to make all needful rules and regulations with respect to the water supply of said water works, and to do all acts necessary for the construction, completion, management and control of the same, including appropriation of private property for public use in the construction and operation of said water works, and also to contract with and procure individuals or corporations to construct, and maintain water works, upon such terms and under such regulations as might be agreed upon.

II. In said year 1880, the subject of supplying said City with water occupied the attention of its City Council which employed Mr. J. D. Cook, a professional and competent engineer, to devise and formulate a plan for the construction of water works, who, after careful and extensive examination and consideration, on the 8th of June of that year, made a report which is set forth at length in the volume of the Charter and Ordinances of the City of Omaha, of 1890, on pages 576 to 596, to which, if it shall be necessary to do so, your orator prays leave to refer.

On the 11th of June following the Mayor and Council of said City passed the Ordinance Number 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska."

Said ordinance was, at divers times amended in several of its provisions not material to this controversy, and the time for the completion of the said works, was extended to the 4th of September, 1883.

Under Section 3 of Ordinance Number 430 which amended Section 12 of the Ordinance Number 423, the City Clerk advertised for sealed proposals and Sidney E. Locke filed with that officer, written proposals called for by said Ordinance, accompanied with a bond with sufficient sureties in the sum of Twenty-five Thousand Dollars (\$25,000) conditioned as required in the said Ordinance, which the City Council accepted; and said city and said Locke entered into a written contract providing that said Locke should erect, maintain and operate water works in said city and furnish water through not less than two hundred and fifty hydrants of the character and located and placed as in said Ordinance prescribed, and also through intermediate hydrants in addition to those above mentioned as

3 might be further called for and additional hydrants which might be required to be constructed and maintained on new mains. In consideration whereof, said city agreed to pay said Locke for said hydrant water supply at the rates of eighty-four dollars per

year for each of the two hundred and fifty hydrants first mentioned above, ten dollars per year for each intermediate hydrant secondly above mentioned, and sixty dollars per year for additional hydrant lastly above mentioned; such payments to be made on the first day of January and July of each and every year as by the said contract reference being had thereto, will more fully appear.

On the — day of —, the said Locke assigned, transferred and set over to the City Water Works Company of Omaha, a corporation organized and existing under and by virtue of the laws of Nebraska, the said contract with all the rights privileges, immunities, profits, duties and obligations which he had thereunder and the said city approved and accepted the said company in place of the said Locke as a party to the said contract.

III. Shortly after the passage of the aforesaid Ordinance, the City Water Works Company commenced the construction of a water system and completed the same about the fourth of September, 1883; the said system in all its parts conformed to Mr. Cook's report and the said Ordinance and said works were accepted by the Mayor and Council of the said city by an ordinance passed on the day last aforesaid.

On the 1st of July, 1887, the said Company assigned, transferred and conveyed the said works and all its privileges, franchises and assets to the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, and on the 10th of January following, the City Council approved the said assignment and transfer and accepted the said American Water Works Company in place of the said Locke and the said Water Works Company, as if it had been the original contracting party instead of the said Locke.

On the 1st day of July, 1887, the said Water Works Company made to the Farmers' Loan & Trust Company, a corporation organized under the laws of the State of New York, a mortgage bearing date on that day, whereby it mortgaged its water works and the franchises, grants and property of every name and nature, being parts of the said works to secure a large issue of the bonds of said Water Works Company, which mortgage was recorded in the office of the Register of Deeds of the County of Douglas on the 18th day of July, 1887, as by the said Indenture of Mortgage ready to be produced as your Honor shall direct, will on reference thereto, fully appear.

As soon as the last named company came into possession of the said works and property, it commenced the construction in Florence, upon the bank of the Missouri River, of settling basins, a power house, intakes and large and expensive engines for drawing the water from the river to the upper of said basins, and pumping it from the lower basin to the reservoir mentioned in the above several ordinances heretofore referred to, and whence it was distributed to all points in the City of Omaha.

Your orator further shows to your Honors that at the time the first proceedings were taken with respect to building water works in the year 1880, and at the time the contract was made with Sidney E. Locke, in the year 1883, the population of the City of Omaha was

about 30,000, and that the said City of South Omaha had then no existence, but that the ground now occupied by the City of South Omaha was land adjacent to the City of Omaha, on the south, and was in the ordinary course expected to become a part of the City of Omaha when said city should expand and grow, and that in the intervening years between the year 1883 and the taking of the said land south of and adjacent to the City of Omaha into the City of South Omaha, a great portion of the City of South Omaha was held and understood to be a part of the City of Omaha, and in several instances water pipe of your orator was, by direction of the authorities of the City of Omaha, laid in and upon the streets of the City of South Omaha, said City of Omaha holding and believing it to be part of its said city.

In the year 1883, certain persons, most of them being residents of the City of Omaha, organized a corporation known as the South Omaha Land Company and purchased a large body of land adjacent to the City of Omaha on the south and contiguous to the lines of the Omaha Water Company and upon a portion of said land, they established the South Omaha Stock Yards and located from time to time, Packing Companies upon parts of said land and such growth was constant and successful. In the years 1884, 1885 and 1886 and thereafter, they also laid off a large quantity of said land into lots and blocks calling the same South Omaha and during the years 1884 and 1885 sold lots and blocks to purchasers and by degrees as people became purchasers, the number of inhabitants increased, the said enterprise became populated and assumed the proportions of a City.

But as yet, no regular organization had taken place nor was such enterprise any different than other populated land adjacent to the City of Omaha, until in the year —. In that year, said South Omaha Land Company and those associated with them, finding their enterprise so successful and that a large number of persons were connected therewith, and being desirous of controlling the same, procured the organization of such population, into the City of South Omaha. After the incorporation of said City of South Omaha, there was considerable uncertainty as to the boundaries between Omaha and South Omaha nor were the limits of said cities determined until resort was had to the courts when such boundaries were by decree fixed and settled.

IV. In 1887, the American Water Works Company had and could deliver by its mains and pipes, more water than was needed or called for by the defendant and its people and the City of South Omaha and its inhabitants and industries located, built and operated at that city had urgent need of such surplus, which if furnished to them by said company would yield large income to it.

Thereupon, the said company entered into contracts with the City of South Omaha and the proprietors of the several industries there located, for supplying them with water. The contract with the City of South Omaha, was expressed in an Ordinance entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of water for domestic

and fire purposes, to the American Water Works Company of Chicago, Illinois, for the term of seventeen years," approved on the 17th day of October, 1887.

Thereupon the said Water Works Company extended its mains, pipes and works into said City and has ever since maintained the same therein, and delivered and distributed water through the said mains, pipes and works and supplied said city and its people and industries with water not needed or called for by the city of Omaha and its people, and without objection from any parties whatever. At the same time, the City Council of Omaha required said Water Company to extend its mains, pipes and lines south of the south line of said city and locate hydrants along the same and said Water Company complied with such requirements of said City Council and accordingly, extended its mains, pipes and lines and located such hydrants and thereby utilized the said surplus water and supplied South Omaha, its people and the industries located at that place.

On the 25th of August, 1903, the Mayor and Council of the City of South Omaha passed an Ordinance entitled: "An Ordinance authorizing and making a contract between the city of South Omaha and the Omaha Water Company for a water supply for a period of ten years from and after the 17th day of October, 1904."

V. On the 8th day of August, 1889, the Mayor and Council of the City of Florence passed an Ordinance entitled "An Ordinance to procure a supply of water for the city of Florence and its inhabitants, for fire and domestic purposes, and to contract with The American Water Works Company therefor," which was approved on said day.

On the 2nd day of September, 1903, the Mayor and Council of the City of Florence passed a further Ordinance, entitled "An Ordinance amending Sections three, four, five, six and seven of an Ordinance entitled 'An Ordinance to procure a supply of water for the City of Florence and its inhabitants and to contract with the American Water Company for a supply for fire and domestic purposes'."

Under and in pursuance of the two Ordinances last above referred to, and from the date of the first thereof, your orator and its predecessors have performed on its part all and every the stipulations and agreements in the said Ordinance contained to be performed by it, and the said City of Florence has, on its part performed all and every the stipulations and agreements in the said Ordinances contained, to be performed by it.

VI. On the 8th day of August, 1890, the said American Water Works Company of Illinois entered into a contract with the East Omaha Land Company, a corporation organized under the laws of the State of Nebraska, wherein it was cited that the said Water Company is the owner of a large body of land therein described, a part of which had been laid out in lots, streets and alleys by said Land Company; and the said Land Company granted and conveyed to the said Water Company, the exclusive right and privilege to lay down, maintain, repair, relay and replace pipes, valves, hydrants and other apparatus for the distribution of water in, upon, along and

through the said streets, lanes, alleys and public places according to a plat thereto attached. And the said Water Company agreed that it would, when thereunto required, lay a line or lines of pipe from its system in the City of Omaha to the intersection of Locust Avenue and Ninth Street upon such point or points upon the said premises as the said Land Company should direct; that from the intersection of Locust Avenue and Ninth Street, one fire hydrant should be ordered for every 400 feet of extension, and when an extension should be ordered east of Ninth Street, one fire hydrant should be ordered for each 400 feet of extension; but no extension of mains or pipes need be made from the present system unless at least one mile of pipe is ordered east of the intersection of Locust Avenue and Ninth Street; and that the said Water Company would, at all times, keep said mains and hydrants supplied with water under a pressure of less than ninety pounds for fire, domestic and manufacturing purposes.

7 It was further agreed between the parties that the hydrant rental to be paid by the said Land Company, should be the same as that paid by the City of Omaha for additional hydrants, subject to a reduction to correspond to any reductions which should be made in hydrant rentals in the City of Omaha, and other places, to private consumers for water should not exceed those charged in the City of Omaha; and that in case of any purchase of the works of said Water Company by the City of Omaha, and the property of the said Land Company, should not be included within the corporate limits of that city, and said Land Company should have the option to purchase the mains and pipes laid down within the said property. And if it did not choose to purchase the same, the Water Company should convey the same to the City of Omaha, subject to the provisions of the said instrument, and in case neither should be done the Water Company should in due season, provide water supply through its mains and pipes at the rates thereinbefore provided. And in the said contract, were divers other stipulations and agreements not material to this controversy, as by the said contract to be produced as your Honors may direct, will more fully appear.

In 1890 and thereafter, said Water Company laid in the lands of said Land Company, mains and pipes and erected along the same, hydrants from the intersection of Locust Avenue and Ninth Streets, as follows:

On 27th Street from Locust Avenue to Avenue "H," 1266 feet and 27 hydrants.

On 23rd street from Locust avenue to a point 400 feet south, 464 feet and 11 hydrants.

On 25th street from Locust Avenue to Avenue "K," 653 feet and 7 hydrants.

On 27th street from Avenue "K" to Avenue "L," 685 feet, all the foregoing being 6 inches.

On Locust Avenue from 13th street to Ninth street, 3120 eight inch pipe.

On Locust Avenue from Ninth Street to 25th Street, 5283 12 inch pipe and 115 hydrants.

8 On Avenue "K" from 25th street to 27th Street 660 feet 6 inch pipe and 16 hydrants, and has ever since maintained the said mains and pipes and is now delivering water through the same.

VII. On the 7th of September, 1889, the Village of Dundee a municipal corporation organized under the laws of this State by its proper authorities, passed a resolution granting to the said Water Company, the right and privilege of laying water mains and pipes in certain streets therein mentioned, and of entering upon the said streets for the purpose of laying, relaying, repairing and removing said mains and pipes and doing all kinds of work in connection with the said mains and supplying water through said streets.

And thereupon, the said Water Company laid mains and pipes in 48th street from Burt Street to Dodge Street, 8 inch 2470 feet of pipe, and also 196 twelve inch pipe.

On Hoagland Avenue from Cass Street to Capitol Avenue, 985 feet; on Nevada Avenue from Webster Street to Cass Street, 1002 feet; on Webster street from Nevada Avenue to 48th Street, 1919 feet and 18 hydrants; on Underwood Avenue from Nevada Avenue to 48th street 1919 feet; on Cass Street from Nevada Avenue to 48th Street, 1919 feet and 18 hydrants; on Chicago Street from Hoagland Avenue to 48th street, 1261 feet; on Davenport Street from Hoagland Avenue to 48 Street, 1261 feet and 9 hydrants; on Capitol Avenue from Hoagland Avenue to 48th Street, 1323 feet all of which pipe was 6 inches.

On California street from Nevada Avenue to 48th Street 1919 12 inch pipe and 9 hydrants.

All of which mains and pipes and hydrants have been maintained and are now being maintained and water delivered through the said mains, pipes and hydrants by your orator.

Not only are the cities of Omaha, South Omaha and Florence and the Village of Dundee, but also the lands of East Omaha, adjacent to one another, but for all purposes of business and intercourse, they form one community and are distinct only for the reason that they are separately organized.

VIII. From the establishment and completion of the water works system, and the acceptance thereof by said city, the business of said Water Works Company and its successors has constantly increased; and the City of Omaha and surrounding communities adjacent thereto, and served by the said water works system, have increased to over 160,000 inhabitants, and your orator now serves water 9 to its customers through over 15,000 service pipes throughout said city and county and adjacent thereto, so that the customers which your orator serves with water number many thousands, and your orator is under contract to serve such customers, and is bound and obligated by law and by its contract with the City of Omaha to supply them with water.

In many instances the contracts between your orator and its customers involve large sums of money and great quantities of water; the business of supplying water is one which makes the duty incumbent upon your orator absolutely necessary to the well-being and

health and comfort of the community in which your orator transacts its business; and your orator's business is highly necessary to be carried forward, and its contracts to be carried out, as it is in duty bound to do.

Your orator's said business has become very large pecuniarily and of great consequence to the community, and to its customers. Its duty with respect to the carrying out of its obligations are complex, requiring the exercise of a large amount of skill and care, both in operating the plant of your orator and in supplying its customers with water; and in cleansing and purifying the same so that its employees, trained for many years in handling its business cannot easily or safely be changed without detriment to the consumers of water, without violation of your orator's contracts, and without impairment of its obligations to the community in which it does business, unless such change shall be made pursuant to such proper orders and directions of this Honorable Court, as shall enjoin and direct the City of Omaha to fully comply with the contracts and duties of your orator in and about the premises, and the careful and proper execution of such contracts by men skilled and trained in the operation of such works, and in supplying the said city and its inhabitants, and the inhabitants of communities adjacent to said city, and all other customers of your orator with water, so that neither the safety of said water works plant and its efficiency and proper management, nor the health, comfort and convenience of the inhabitants of said city, consumers of water, and contracts with your orator for the same, shall be impaired, or their rights improperly affected.

And your orator shows to this Honorable Court that at the time the contract was made between Sidney E. Locke, his successors and assigns, in the City of Omaha, and by the terms of said contract it was agreed and understood by and between the City of Omaha and Sidney E. Locke, his successors and assigns, that the said Locke

his successors and assigns, in erecting the water plant under
10 said contract within and adjacent to the city of Omaha, should furnish water to citizens residing along the line of said mains, or contiguous to the same as well beyond as within the limits of said city; that at the time the contract was made between Sidney E. Locke, his successors and assigns, and the City of Omaha, the said City was a rapidly growing community, and that it was well understood between said city and said Sidney E. Locke, his successors and assigns, that said city was a prosperous and growing city, and that there would be an inevitably great prospective increase in its population, business and boundaries; and it was well understood and agreed and contracted between the parties to such contract, and their successors and assigns, that the business of the said water company must, of necessity, increase and grow and enlarge within the City of Omaha and county adjacent thereto; and that it becomes and is the duty of said City of Omaha, by virtue of said contract, and by virtue of the law relating to the establishment of said Water Company's works, and the system by which it has been constructed, and the duty devolving upon the City of Omaha to take over the said plant, to in all respects take upon itself the burden and duty of carrying out the con-

acts and obligations of the said Water Company to and with the inhabitants of the City of Omaha, and to and with the citizens of the City of Omaha and to and with the citizens of the territory adjacent hereto occupied by the said Water Company and supplied by the said Water Company with water.

IX. On or about the 16th of January, 1889, the said American Water Works Company of Illinois made its supplemental mortgage at that date, whereby it mortgaged to the said Farmers' Loan & Trust Company in addition to the premises, works, franchises, grants, rights and other property covered by its mortgage hereinbefore mentioned, additional property acquired by it since the making of said mortgage and also the rights of said American Water Works Company under the Ordinances of South Omaha and Florence, above entitled; also all and singular the pipes, mains, valves, hydrants, and other apparatus now lying and being in the streets, alleys, and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the county of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, under and by virtue of the several ordinances and contracts each and every one of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies. Which supplemental mortgage was, on the 27th day of March, 1889, recorded in the office of the Register of Deeds of Douglas County, Nebraska.

X. The said Water Company made default in the performance of divers stipulations and covenants in the said mortgages contained, whereupon said Trust Company on the 9th of October, 1893, exhibited in this court, its bill against said company and others, wherein alleged said defaults and prayed the foreclosure of said mortgages. Ellis L. Bierbower and Alonzo B. Hunt were appointed receivers of said Water Works Company and all its works, property and thereupon they entered into the same and operated the same until the time hereinafter stated. Such proceedings were had in the said suit, that on the 24th day of June, 1895, a decree was rendered by this court foreclosing said mortgages and ordering a sale of the property described as follows:

That certain piece or parcel of land described as follows:

Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said city, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly along the east line of said right of way, to the south line of said State Street in said city; thence easterly along the south line of said State Street to the east line of said railroad right of way, south of State Street, thence southerly along said right of way line to the north line of Washington Street in the said city; thence east-

erly along the north line of said Washington Street to the east line of Mill Street in said City; thence northerly along the east line of said Mill Street to the northwest corner of block two hundred and fifty-eight (258) in said city; thence easterly along the north line of said block two hundred and fifty-eight (258) to its intersection with the west [—] of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks number two (2) one hundred and twenty-six (126) and two hundred and sixty (260) as laid down on the plat of said city, recorded in the Register's office of said Douglas County.

12 Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water (Streets) and the east line of Mill Street in said city.

Also that other piece or parcel of land known and described as the north fifty (50) feet of Lot Eighteen (18) and the west ten (10) feet of the north fifty (50) feet of Lot Seventeen (17) both in Block two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B. in Reservoir Addition to the said City of Omaha, according to the plat of said addition recorded in the office of the Register of Deeds of said county.

Also those other parcels of land known as Lots One (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q and Lots One (1) Two (2) Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said city; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and three hundred and twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) of Kountze's & Ruth's Addition to the City of Omaha, according to a plat of said addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast one-quarter of section seven (7) in township fifteen (15) north of Range Thirteen (13) East of the Sixth Principal Meridian. And all other land in the

County of Douglas and State of Nebraska and all the right, title and interest therein whereof the American Water Works Company of Illinois and The American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

Also all the right, interest, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled, "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska, passed by the City Council of said City and approved by the Mayor thereof, on the 11th day of June, 1880, and all other ordinances of said city, amendatory thereof and supplementary thereto, also under a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an ordinance of the Mayor and Council of the city of South Omaha known as Ordinance Number 29, entitled "An ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha and approved by the Mayor of said city on the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence, entitled "An ordinance to procure a supply of water for the city of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said city on the 13th of August, 1889, and the contract in pursuance thereof between said city and said Company. And also all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and

all debts, dues, rentals, claims and demands of every name and nature however arising of either of said companies against the City of Omaha, the city of South Omaha, and the City of Florence, any or either of them, whether such debts, dues, demands, rentals and claims, have heretofore accrued and are now existing or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of the said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them, in the county of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest debts, demands, and moneys which may arise out of or come from the operation of said works shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for, which sale took place on the 20th day of May 1896 and at which said Trust Company became the purchaser. This court confirmed said sale and ordered the master who made the same, to make a deed of the property so sold to said Trust Company. On the 16th of July following, the said Master accordingly made his deed to said Company of the property described in said decree. On the 23rd of the same month, said Company conveyed said property to your orator and under the order of this Court the said receivers and said Trust Company delivered possession of said property to your orator who entered into and has ever since held possession of said premises, and has ever since maintained and operated said works and all thereof. The said decree and the deed of the Master to said Trust Company to your orator, contained full descriptions of the premises and rights, privileges and franchises as above stated, as by the same ready to be produced as your Honors may direct, will more fully and at large appear.

15 XI. On or about the 16th day of May, 1895, the said defendant exhibited its Bill before your Honors against your orator and others complaining of divers neglects and defaults of your orator by reason whereof it claimed that your orator had under section 11 of the ordinance first hereinbefore entitled No. 423, forfeited to said city, all of the property, rights, privileges, and franchises then owned, possessed and enjoyed by your orator including the American Water Works Company under the ordinances of the city of South Omaha, and also all of the property, rights, privileges and franchises then owned and possessed and enjoyed by your orator including the rights theretofore held, enjoyed and claimed by the American Water Works Company under the ordinance of the City of Florence above entitled, and all and singular the mains, pipes, valves, hydrants and other apparatus then being in the streets, alleys and public places of the cities of Omaha, South Omaha and

Florence and all other property in either of said cities or elsewhere in the county of Douglas; and in its said bill, the City of Omaha insisted that under and by virtue of the said decree of foreclosure and order of sale, the Master charged with the execution of the said decree, must, if he sell at all, sell the said tangible property with the said franchises, easements and privileges as an entirety, that by reason of the premises, it became and was and is entitled to the immediate possession of all the property in the said decree described. In its said bill, the said City among other things, prayed that it be declared that the city was entitled to take the immediate possession of all the tangible property of the water works plant of every kind and nature, including all of the property in the said bill and the said decree of foreclosure more particularly described afterwards, and on the 13th of July, 1896, the said city filed its amended bill wherein it alleged substantially the same matter as it had complained of in its original bill and prayed that it be decreed that it has a right to the immediate possession of all tangible property of the water works plant of every kind and nature, including all of the property therein-before mentioned and in said decree of foreclosure described.

XII. Under and in pursuance of an Act passed by the Legislature of Nebraska on the 2nd day of February, 1903, entitled "An Act to provide in cities of the metropolitan class, viz:

1. For the procedure in certain cases, by the Mayor and Council in the acquisition of a municipal water plant.

2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees.

16 3. For penalties for interference with water plant, or employees of water board in the discharge of their duties.

4. For a water fund, its revenue, and the disbursement and application thereof.

And amending sections 13, 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101, 135, 138 and 140 of an act entitled 'An Act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An Act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,' approved March 30, 1887, and all acts amendatory thereof, being Chapter 12, of the seventh edition of the Compiled Statutes of the State of Nebraska (Edition of 1895), entitled "Cities of the Metropolitan Class," approved March 15, 1897, being Chapter 12, of the Tenth Edition of the Compiled Statutes of the State of Nebraska (Edition of 1901) entitled "The Compiled Statutes of the State of Nebraska, 1881 (Tenth Edition) with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the Legislature by Guy A. Brown and Hiland H. Wheeler and certified to by Hiland H. Wheeler, compiler, of date July 1st, 1901, and repealing said original sections.

The Mayor and Council of the defendant, on the 2nd of March, 1903, passed an Ordinance entitled "An Ordinance declaring that it is necessary and expedient for the City of Omaha to purchase the

system of Water Works operated by the Omaha Water Company and providing for notification by the Water Board and to said Water Company, to select one engineer as an appraiser to ascertain the value of said Water Works Plant," by which ordinance said City of Omaha elected and determined to purchase and acquire said system of water works and elected and determined to purchase and acquire the same by virtue of the rights inuring to said city through the contract between said city and the grantors of your orator, and as authorized and provided by section 14 of said ordinance No. 423.

XIII. Under and in pursuance of the Act last above entitled, the Governor appointed James E. Boyd, Guy C. Barton, Isaac E. Congdon, Thomas J. Mahoney, Milton T. Barlow, and John F. Coad, members of said Water Board, who thereupon duly organized as said Board and took upon themselves the performance of the duties mentioned in said Act; and they now claim to be acting in that capacity.

17 Thereupon, the said board nominated to the Mayor and Council of said City and said Mayor and Council selected as one of the appraisers for the purpose of ascertaining the appraised valuation of said water works plant, John W. Alvord, an engineer, and your orator nominated George H. Benzenberg, an engineer, as the second appraiser for such purpose and the said Alvord and Benzenberg selected Daniel W. Mead, an engineer, as the third appraiser for such purpose.

On the 18th of June, 1903, the said Alvord, Benzenberg and Mead organized by the election of said Mead as Chairman of the said Board of Appraisers, and thereupon, they entered upon the examination of the system of water works operated by your orator, and have duly appraised the valuation of the said system of water works at the sum of \$6,263,295.49, as by their report in that behalf, dated July 7th, 1903, reference being had thereto, will more fully appear. Thereupon, your orator tendered to the Mayor of the said defendant, a good and sufficient deed duly executed by your orator under its corporate name and seal, conveying to said defendant the system of water works operated by your orator, the several parts whereof are above referred to and are in the cities of Omaha, South Omaha and Florence, the Village of Dundee and *and* the lands of the East Omaha Land Company, particularly describing the same in the said deed as by said deed, ready to be produced as your Honors shall direct, will, upon reference thereto, more fully appear. And your orator demanded payment to it by said defendant of the sum of money at which the said appraisers valued said system of water works, that is to say, the sum of \$6,263,295.49; but the said defendant refused to pay the said sum or any part thereof, nor has it at any time paid or offered to pay the said sum or any part thereof, but still refuses so to do.

Your orator prays leave to refer to each and every of the ordinances hereinbefore entitled of the cities of Omaha, South Omaha and Florence as the same appear in books and pamphlets of the Ordinances of said cities purporting to be printed by their Councils respectively.

All which actings, doing and pretenses of the defendant are con-

trary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator.

In consideration of the premises, and for as much as your orator is remediless at and by the strict rules of the common law, and to the end that the said defendant answer this your orator's bill, but not under oath, the answer of the defendant under oath being hereby waived, and that it be by your Honors declared, that the said defendant is liable to pay to your orator, the sum at which the said engineers and appraisers have estimated the value of said system of water works, to-wit: the sum of \$6,263,295.49, and that its contract in that behalf ought to be fully executed and performed, and that the said defendant be decreed to take over your orator's plant above described, under and by virtue of the ordinances and contracts aforesaid, and pay the said sum to your orator, who will deliver a good and sufficient deed of its water plant and every part thereof as hereinbefore described, and that your orator have its costs of this suit, and all such other and further relief as the circumstances require, and is agreeable to equity and good conscience.

May it please your Honors to grant unto your orator the writ of subpoena, under the seal of this Honorable Court, directed to the City of Omaha, commanding it within a day therein limited, to answer this your orator's bill and [state] to, perform and abide the orders and decree of your Honors as in equity and good conscience ought to be done.

And your orator will ever pray, etc.

THE OMAHA WATER COMPANY,

By R. S. HALL, *Its Solicitor.*

HOWARD MANSFIELD,

Of Counsel.

UNITED STATES OF AMERICA,

District of Nebraska, County of Douglas, ss:

Theodore C. Woodbury, being first duly sworn, deposes and says: the matters and things set out in the bill of complaint hereinbefore written are true of his knowledge except such matters and things as are set forth on information and belief, and as to such matters and things, he believes them to be true.

THEODORE C. WOODBURY.

Signed in my presence and subscribed before me this ninth day of July, 1906.

[SEAL.]

PAUL L. MARTIN,

Notary Public.

Com. expires Nov. 6, 1911.

Endorsed: Filed Jul- 9, 1906. Geo. H. Thummel, Clerk.

19 Thereupon afterwards, to-wit: On the 3rd day of September 1906, Answer to the Bill of Complaint was filed in said case, which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska.

OMAHA WATER COMPANY, Complainant,
vs.
CITY OF OMAHA, Defendant.

Answer to the Bill of Complaint.

The defendant now and at all times hereinafter saving and reserving to itself all manner of benefits and advantages of exception to the many errors and insufficiencies in the complainant's bill of complaint contained, for answer thereto, — so much thereof, and such parts thereof, as this defendant is advised it is material for it to make answer unto, says:

I.

The defendant admits that the Omaha Water Company is a corporation existing under the laws of the State of Maine and a citizen of said state, and that the defendant, the City of Omaha is a municipal corporation, organized under the laws of the State of Nebraska as a city of the metropolitan class, and that it is a citizen of the State of Nebraska.

And in that regard the defendant further says that it was organized and became a city of the metropolitan class in 1887, and that prior to said date during all the times mentioned in complainant's bill of complaint, it was a municipal corporation and a city of the first class, and has at all times been possessed of the powers, and none other, that belong to said cities of the first class and said metropolitan cities under the laws of the State of Nebraska, as they have from time to time existed.

And the defendant avers that the power of the Mayor and council of the defendant city to contract with and procure individuals or corporations to construct and maintain water works was limited to the City of Omaha and the inhabitants thereof; and further avers that at the time when the contract hereinafter mentioned was entered into and at all times since said date, the defendant City and the Mayor and Council thereof did not have power or authority to enter into any contract with any individual or corporation for the construction or maintenance of water works for the use of any person or persons, municipalities, or corporations outside of the corporate limits of the City of Omaha. And the defendant
20 further avers that the Mayor and Council of the City of Omaha, in the passage of the Ordinances Nos. 423 and 430, hereinafter referred to and in the entering into of the contract with Sidney E. Locke, hereinafter referred to, did not in fact nor by intendment contract for or authorize the construction of water works for the supplying of water to any persons or corporations or municipalities, outside of the corporate limits of the City of Omaha, or authorize or permit the use of the streets and grounds of the City of Omaha to be used for the laying of water mains for the transmission of water to any persons, corporations or municipalities outside

the limits of the City of Omaha; and defendant further avers that the plaintiff company and its predecessors in the laying of water mains and in the putting in place and operation of machinery and appliances, as instrumentalities for transmitting water through the streets, alleys and public grounds through the City of Omaha to persons, corporations and municipalities without the corporate limits of the city of Omaha, has at all times exceeded and acted beyond any power or authority conferred by the City of Omaha.

II.

The defendant admits that the amount in controversy, in this action exceeds the sum of two thousand dollars (\$2000) exclusive of interest and costs.

III.

The defendant admits that in the year 1880, the then City of Omaha, being a city of the first class under the laws of the State of Nebraska, secured the report of J. D. Cook upon a plan for the construction of water works and the securing of water for the City of Omaha and the inhabitants thereof; and that said Cook did, on the 8th day of June of said year, make a report, which is found in the volume of the Charter and Ordinances of the City of Omaha of 1890, at pages 576, and following; and that on the 11th day of June, in said year the City Council of the then City of Omaha passed an Ordinance numbered 423, referred to in the complainant's bill; and that the said ordinance was at divers times amended, particularly by Ordinance Number 430, all of which are published in the before-named volume of Charter and Ordinances, to which reference is made.

Defendant further admits that in pursuance to the provisions of Ordinances Nos. 423 and 430 above referred to, the City Clerk of the City of Omaha advertised for sealed proposals for bids to supply the City of Omaha with water for public use, and that Sidney E.

21 Locke filed a written proposal to supply water to the City of Omaha for its public use, accompanied by a bond as required

by the aforementioned ordinances, which said proposal was accepted by the city and a written contract was entered into between the said Sidney E. Locke and the then City of Omaha for the supplying of said city with water through hydrants for its public use, said contract being fully set forth in the volume of Ordinances before referred to.

IV.

The defendant further admits that the said Sidney E. Locke assigned his rights under said contract to the City Water Works Company, and that the said City Water Works Company commenced the construction of water works for the purpose of supplying the City of Omaha and the inhabitants thereof with water under said contract, and completed the same about the 4th day of September, 1883, and that the same was on said date accepted by the Mayor and City Council of the then City of Omaha.

That said water works as constructed by the City Water Works

Company and accepted by the Mayor and Council of the City of Omaha as being in full compliance with the said contract was entirely within the corporate limits of the City of Omaha, and said water works nor any part thereof was then used or intended to be used for the supplying of water to any persons, companies or municipalities outside of the corporate limits of the City of Omaha.

The defendant further admits that about the first day of July, 1887, the said City Water Works Company assigned its rights under said contract to the American Water Works Company, a corporation organized under the laws of the State of Illinois, but denies that the said assignment was approved by the City of Omaha.

The defendant further admits that about the date of said transfer the said American Water Works Company made and executed its mortgage deed to the Farmers Loan and Trust Company to secure its bonds, which said mortgage deed was duly recorded about the 18th day of July, 1887.

The defendant further admits that at some time thereafter, to-wit: about in the year 1889, the said American Water Works Company commenced the construction in and near Florence, of settling basins and other works for the purpose of pumping and storing water from the Missouri River, for the purpose of supplying said City of Omaha and its inhabitants with water; but all of
22 which was done by said company of its own volition, and was not done under any direction or authority from the City of Omaha.

The defendant further admits that at the time of the passage of Ordinances Numbers 423 and 430, and at the time of the said contract with Sidney E. Locke, the City of South Omaha had no existence, and alleges that the ground whereon the same is now located was ordinary farm land, and was not contemplated to be or become any part of the City of Omaha, and was not in the minds of the said City Council nor of the said Sidney E. Locke, as a part of the said City of Omaha, and was not expected by the parties to become a part of the City of Omaha.

Said defendant denies that any portion of the now City of South Omaha was then understood to be or held as a part of the City of Omaha, and further denies that the complainant in this action, or any of its predecessors, was in any manner directed or authorized by the City of Omaha to lay pipes in or across or over any of the territory now included within the limits of South Omaha.

Defendant admits that sometime thereafter, the exact date of which is to the defendant unknown, the South Omaha Land Company was organized and purchased a portion of the tract of land now included within the limits of South Omaha for the purpose of establishing stock yards and locating packing companies; and that said company expended large sums of money and laid out the same into town lots and blocks, and that thereafter the said land so owned by the South Omaha Land Company, and other lands, was incorporated and organized under the general laws of the State of Nebraska as a City, under the name of South Omaha, but the defendant denies that any action in that regard was taken by direction or au-

thority or under any power conferred upon said company by the City of Omaha.

The said defendant admits that certain water pipes were laid and extended by the American Water Works Company over, on and through the district then comprising South Omaha, and is informed and believes that the said American Water Works Company entered into some contract with, or secured a franchise from the City of South Omaha authorizing said American Water Works Company to lay pipes within the said City and to furnish water to said city, and entered into contracts with the proprietors of certain industries located in said city for supplying them with water, the terms of which franchises and contracts are unknown to the defendant, but it alleges that whatsoever said franchises or contracts may have been or may be, they were not entered into by or
23 under any authority conferred upon the American Water Works Company by the City of Omaha, nor did the said City of Omaha, give any consent thereto.

Said defendant further admits that since the construction of its mains and pipes in said city of South Omaha, the American Water Works Company and its successors in interest have delivered water to South Omaha and to the various industries thereof, and to the inhabitants of said City; but alleges that the same was without the consent of the City of Omaha; and was done without any authority received by the said American Water Works Company or its successors from the said City of Omaha; and the defendant denies that the City of Omaha or any of its authorities authorized or required said Water Company to extend its mains outside of the City of Omaha, and alleges the fact to be that it had no authority or right or power under the laws of the State of Nebraska to require said Water Company to extend its mains or pipes or locate its hydrants, and alleges that whatsoever was done by said Water Works Company or its successors in supplying the City of South Omaha or the inhabitants thereof, or the industries therein located, with water, was done voluntarily by the said Water Works Company and its successors, and by reason of the authority granted by the franchises of the City of South Omaha and the contracts made between said Water Works Company and the proprietor of the industries located therein.

The defendant denies that the Water Company had and could deliver by its mains and pipes as they existed in 1887, more water than was needed or called for by the City of Omaha and its inhabitants, and avers that the Water Company entered into its contracts with the industries located at South Omaha, and obtained its franchise from the City of South Omaha, simply and purely as a business proposition based on the revenue and profits to be derived therefrom and on account of which the American Water Works Company and the plaintiff company has received large profits and revenues therefrom.

The defendant avers that the said American Water Works Company and the Omaha Water Company in order to supply the City of South Omaha and its inhabitants and industries with water, found it necessary to construct and did cause to be purchased and con-

structed, additional pumping engines at the Florence Pumping Station, and larger water mains through the streets and public grounds of the City of Omaha, and an additional pumping station, commonly known as "The Poppleton Pumping Station," and which said construction and improvements cost large sums of 24 money, the extent whereof the defendant cannot state, and which said extensions, improvements and construction, so made necessary for the purpose of supplying water to South Omaha, its inhabitants and industries, were and are unnecessary for the purpose of supplying water to the City of Omaha and the cost of which extensions, improvement and construction the engineers, Benzenberg and Mead, hereinafter referred to, improperly, wrongfully and illegally included in their estimate of the valuation of the water works in the City of Omaha.

V.

The defendant avers that on or about the 25th day of August, 1903, the Omaha Water Company, complainant entered into a contract with the City of South Omaha under and by virtue of an ordinance of the City of South Omaha, approved August 25th, 1903, and amended by an ordinance approved November 30, 1903, by which the Omaha Water Company bound itself to the city of South Omaha to supply the City of South Omaha with water for the period of ten (10) years from the 17th day of October, 1904, and to pay to the City of South Omaha an annuity of One Thousand (\$1,000) Dollars for the year of 1903, and an annuity of Twenty-five hundred (\$2,500) dollars per annum after the year 1903, during the period of said contract and by the terms of which said contract and ordinances the Omaha Water Company bound itself to continue the operation of its water plant within the City of South Omaha, until the 17th day of October, 1914, and is without authority to transfer the said franchise or contract to the City of Omaha without the consent of the City of South Omaha which has not been obtained, and the City of Omaha is without power or authority to take over the said franchise and contract, and is without power or authority to fulfil or perform the same.

And the defendant further avers that the accepting of the said franchise and the entering into the said contract by the Omaha Water Company with the City of South Omaha, was without authority from the City of Omaha and was not done pursuant to any authority or power granted by the City of Omaha; and that said franchise was accepted and said contract with South Omaha entered into after the City of Omaha and passed its ordinance of March 2, 1903, providing for the appointment of engineers to estimate the value of the water works, and by reason whereof the Omaha Water Company is estopped to insist that the City of Omaha is required to purchase its property in South Omaha.

The defendant further avers that after the passage by the Mayor

and Counsel of the City of Omaha of ordinance No. 5162 approved March 2nd, 1903, the Omaha Water Company accepted a franchise from the City of Florence under date of November 14, 1903, by Ordinance No. 160, amending Section 3, 4, 5, 6 and 7, of an ordinance of August 13, 1889, by which the Omaha Water Company bound itself for a period of twenty-five (25) years from the 14th day of November, 1903, to maintain water mains, pipes and hydrants in the City of Florence and to furnish water for twenty-five (25) years free of charge for public schools and for public drinking fountains in the City of Florence. That the Omaha Water Company when it so accepted said franchise and entered into said contract obligation with the City of Florence for a period of 25 years, well knew of the action which had been taken by the City of Omaha providing for the selection of engineers to estimate the value of the water works as per said ordinance approved March 2, 1903; and that the Omaha Water Company then and there well knew that the City of Omaha had not authorized or consented to the said franchise so granted by the City of Florence, or to the entering into of the said contract with the City of Florence, and that the City of Omaha was without power or authority to take over the said franchise and contract, and that by reason of the premises the Omaha Water Company is estopped from insisting that the City of Omaha is required to purchase its property in the City of Florence covered by the said franchise and said contract, or to assume the obligations thereof.

VII.

The defendant avers that the American Water Works Company entered into a contract with the East Omaha Land Company under date of August 8, 1890, by which the Water Company was given the right to lay water mains over the property of the East Omaha Land Company, and in which contract it was, among other things, provided that in the event of the sale to the City of Omaha of the water works within the corporate limits of the City of Omaha, that the East Omaha Land Company should have the option to purchase the mains and pipes laid down within the East Omaha Land Company's property, and which said contract also provided the manner of ascertaining the value thereof by three disinterested persons, one to be appointed by each of the parties thereto, and the third by the two so chosen. That the said American Water Works Company entered into the said contract with the East Omaha Land Company with knowledge of the provisions of Section 14, Ordinance No. 423, and the Omaha Water Company succeeded to the rights of the American Water Works Company under said contract with the East Omaha Land Company. That said contract was entered into without the direction of or authority from the City of Omaha and the City of Omaha is without authority to take over the said contract with the East Omaha Land Company and the East Omaha Land Company has not given its consent to the transfer of the said contract to the City of Omaha, and by reason of the premises the Omaha Water Company is estopped to insist that the City of Omaha is required to purchase its said property within the limits

of the East Omaha Land Company, or to assume the obligations of said contract.

VIII.

The defendant avers that on or about the 7th day of September, 1889, that the village of Dundee granted to the American Water Works Company, by resolution, the right to lay water mains upon and along its streets upon certain conditions therein provided for, and that subsequently, on the first day of December, 1900, the Water Company presented a communication to Dundee offering to put in certain hydrants on water mains for a rental of \$60.00 per year, and the village of Dundee, on the 22nd of December, 1900, passed a resolution accepting the said proposition of the Omaha Water Company.

That by the terms of the said resolutions the said Omaha Water Company entered into a contract with Dundee for the maintenance of its water mains and fire hydrants for an unlimited period of time. That the American Water Works Company and its successor, the Omaha Water Company, accepted the said franchise and entered into the said contract with knowledge of the provision of Section 14, of Ordinance No. 423, and without being authorized by the City of Omaha to accept the said franchise, or to enter into the said contract with Dundee, and with knowledge that the City of Omaha was and is without authority to take over the said franchise and contract. And that the village of Dundee has not given its consent to the transfer of the said contract, and by reason of the premises the Omaha Water Company is estopped from insisting that the City of Omaha is required to purchase its property lying and being within the village of Dundee, or to assume the obligations of said contract.

And the defendant denies that the said municipalities of South Omaha, Florence, East Omaha and Dundee constitute and form one community with the City of Omaha, and deny that the

27 territory covered by said municipalities are adjacent to one another.

IX.

The defendant admits that since the original construction of the water works within the City of Omaha, as before described, and the acceptance of the same by the City of Omaha, the business of said Water Works Company and its successors has increased, and that the combined inhabitants of said municipalities before referred to, together with the inhabitants of the City of Omaha, have increased to the neighborhood of one hundred and sixty thousand inhabitants, and the defendant is informed and believes that the complainant serves water through some fifteen hundred service pipes throughout the City of Omaha and the country adjacent thereto; but the defendant denies that said Water Works Company is bound or obligated by its contract with the City of Omaha to supply anybody with water outside of the limits of the City of Omaha, and denies that any contracts which it may have made, or any obligations which

may be imposed upon said company to supply water to any municipalities or any persons or corporations outside the limits of the City of Omaha are by virtue of any authority conferred upon the said complainant or its predecessors by the City of Omaha, and alleges the fact to be that at the time of the passage of Ordinances Nos. 423 and 430, and at the time of the entering into of the contract before referred to with Sidney E. Locke, it was not contemplated that said Water Works Company or its successors should supply water to any other persons or municipalities than the City of Omaha and the inhabitants thereof.

And said defendant denies each and every other allegation contained in the 8th paragraph of the complainant's bill of complaint, not hereinbefore admitted.

X.

The defendant is informed and believes that a mortgage was entered into between the American Water Works Company of Illinois and the Farmers' Loan and Trust Company, as stated in the 9th paragraph of the complainant's bill of complaint, but alleges in regard thereto that the same was not done by virtue of any authority conferred upon said Water Works Company by the City of Omaha.

XI.

The defendant is now informed and believes that the said American Water Works Company made default in the performance of its stipulations and covenants in said mortgage, and that foreclosure proceedings were had thereunder, and that Ellis L. Bierbower and Alonzo B. Hunt were appointed Receivers of said Water Works Company, and that a decree of foreclosure was rendered as stated in the complainant's bill of complaint, and that a deed was thereafter executed in and under said proceedings, as stated in the complainant's bill; but the defendant alleges in that regard that said deed did not convey to the Omaha Water Company any portion of the property heretofore described in the complainant's bill as being within East Omaha.

XII.

The defendant admits that about the 16th day of May, 1895, a bill was filed in the Circuit Court of the United States for the District of Nebraska, entitled City of Omaha versus American Water Works Company, for the purpose of forfeiting the rights of said Company under Ordinance No. 423 and amendatory ordinances thereof, to the works of said company lying in Omaha and necessary and appurtenant to the supplying of the City of Omaha and the inhabitants thereof with water, but alleges in that regard that the said bill was dismissed, and that no adjudication was had thereunder, and that there was no authority in either the City of Omaha or in the attorneys filing said bill, to claim under said Ordinances Nos. 423 and 430 to forfeit to the said City of Omaha any portion of

said plant, except that lying and being within the corporate limits of the City of Omaha, and necessary and appurtenant to the supplying of said City of Omaha and its inhabitants with water.

The defendant further alleges that in said suit the Farmers' Loan and Trust Company, and subsequently the Omaha Water Company, filed answers denying the various averments in the petition and amended petition, and in their said answers pleaded that the water mains, pipes and hydrants, machinery and appliances lying within and necessary for the supplying of water to East Omaha, South Omaha, Dundee and Florence, were not necessary and appurtenant to the water works necessary for supplying the City of Omaha with water, and that by reason of the premises the Omaha Water Company is now estopped from insisting that the City of Omaha is required to purchase any of the said property so lying and being within East Omaha, South Omaha, Dundee and Florence, or from taking over and assuming the obligations and the contracts of the Omaha Water Company with East Omaha, South Omaha, Dundee and Florence.

The defendant further alleges that the only question considered in said suit was whether or no the City of Omaha was entitled to have a decree of forfeiture entered against the Farmers' Loan
29 & Trust Company, and its successor, the Omaha Water Company, on the ground that said Companies had failed to perform their obligations under the contract with the City of Omaha, and that the Court entered its judgment and decree dismissing the said bill as above pleaded.

XIII.

The defendant admits that on the 2nd day of February, 1903, the Act was passed as stated in the twelfth paragraph of the complainant's bill of complaint, and that on the second day of March, 1903, an ordinance entitled as stated in the complainant's bill was passed by the City Council of the City of Omaha; but the defendant denies that it was intended thereby to purchase or acquire any portion of the water works owned by the Omaha Water Company, excepting such as were within the City of Omaha, and as were necessary and appurtenant to the supplying of the City of Omaha and its inhabitants with water; and alleges in that regard that the said City Council of the City of Omaha was without power or authority to acquire or purchase any water works lying outside of the City of Omaha, and not necessary and appurtenant to the supplying of said city and its inhabitants with water, and that said ordinance was enacted under and by virtue of, and with the intent to carry out, the provisions of Ordinances Numbers 423 and 430, before referred to, and the amendatory ordinance thereof, in order to acquire and purchase the water works of the said complainant lying and being within, and necessary and appurtenant to, the supplying of the City of Omaha and its inhabitants with water, and none other.

XIV.

The defendant further admits that James E. Boyd and others

mentioned in the complainant's bill were appointed as members of the Water Board of the City of Omaha, in pursuance to an Act of the Legislature of the State of Nebraska, and that they organized, and their successors now claim and are acting as members of the Water Board with the powers and duties conferred by the laws of the State of Nebraska upon said Board.

Defendant further admits that said Board nominated John W. Alvord as one engineer to estimate the value of the water works of the complainant, lying within the City of Omaha, and necessary and appurtenant to the supplying of said city and its inhabitants with water, and that the complainant nominated George H. Benzenberg, and that the two engineers selected Daniel W. Mead as a third appraiser for such purpose; but denies that it was the purpose or intent of the said Water Board or of the City of Omaha
30 to have the value of any other works or property owned by the complainant appraised or valued, or to purchase or acquire any other of the works belonging to the said complainant, excepting those lying within the City of Omaha, and necessary and appurtenant to the supplying of said city and its inhabitants with water.

XV.

The defendant admits that about the 18th of June, 1903, the three appraisers met and appointed the said Mead as Chairman, and that they entered upon an examination of the said water works; but defendant denies that the said three appraisers so appointed have made an estimation of the valuation of said works, or any part thereof, and deny that they have made a report showing their estimate of said value; but the defendant alleges in relation thereto that the said appraisers did not agree upon an estimate of value of the said works, or of any particular thereof, and that the said three appraisers did not return, and never have returned an award showing the valuation estimated by said three appraisers; that two of said appraisers, Messrs. Benzenberg and Mead, did make and return a report purporting to be an estimate of said two engineers only, of the valuation of the works of the entire system, and that said pretended report was not the report of three engineers, as provided by the Ordinances Nos. 423 and 430 above referred to, and was not concurred in by the said John W. Alvord, and that the same is null and void.

XVI.

The defendant further states to the court that Daniel W. Mead and George H. Benzenberg, two of the appraisers appointed as above set forth, without right or authority, did make and sign a report, in which said two engineers estimated the value of the entire property of the complainant, of every kind and description, exclusive of the value of unexpired franchise, at the sum of six millions, two hundred and sixty-three thousand, two hundred and ninety-five and 49/100 Dollars (\$6,263,295.49); but said pretended report was not only not the estimate of three engineers, as provided by Ordinances Nos. 423

and 430, but was also so grossly excessive that the same was and is fraudulent and void, and not in any way or manner binding upon the said defendant.

XVII.

The defendant further shows to the Court that said pretended report of Daniel W. Mead and George H. Benzenberg included therein property which said appraisers had not been appointed
31 to appraise the value thereof; and property which the City of Omaha had not agreed to purchase under and by virtue of the ordinances heretofore referred to, and property which the City of Omaha was without power or authority to purchase, and that the said estimate included therein property to which the complainant company had no title; and for said reasons, the said estimate of value is nugatory and void, and would be nugatory and void, even though said appraisement had been concurred in and signed by three engineers.

XVIII.

The said defendant further shows to the Court that the said Daniel W. Mead and George H. Benzenberg, misconceiving their duties in the premises, wrongfully and unlawfully proceeded to estimate and determine the value of the water works belonging to the Omaha Water Company, complainant herein, upon evidence which was presented to them by the said Omaha Water Company, and that they went through the farce of swearing, or pretending to swear, witnesses before them, although they were without power or authority to swear witnesses, or to take and receive evidence; and that in making their report the said engineers, Mead and Benzenberg, based said report in part upon the said testimony produced before them, which testimony was in a large measure hearsay, and the purpose and object and tendency of which said evidence was to give the water works a fictitious value, greatly in excess of its real and actual value.

The defendant further states to the Court that by reason of said conduct of the said two engineers, and by reason of the fact that their estimate of value was based upon what was pretended to be sworn testimony, and not upon their own estimates and examination, that the said report and estimate by said two engineers is null and void and of no force or effect.

XIX.

The defendant further shows to the Court that the said Daniel W. Mead and George H. Benzenburg, in violation of their duties, and against the continued protests and objections of the City of Omaha and the Water Board of the City of Omaha, did, by continuances and accommodations, and otherwise, grant and extend to the Omaha Water Company, complainant herein, a period of nearly one and one-half years, to enable the said complainant company to prepare maps, plans and di-grams, and other detailed forms of evidence, some of which did not in fact represent existing properties, but were drawn up from hearsay, and which in truth and in fact were

32 not proper or competent evidence of the existence or value of the properties, construction work or material which they purported to represent, and that the same were received and accepted by the said Mead and Benzenburg, and that their said report and their estimate of value was in a large measure based upon the said pretended evidence which was received by said appraisers without right or authority; and by reason of the matters herein alleged, the said engineers were induced to make their estimate of value far in excess of what the actual value of said property was and is.

XX.

The defendant further shows to the Court that the said Daniel W. Mead and George H. Benzenburg, acting as appraisers, in violation of their duty and in fraud of the rights of the defendant, permitted the said complainant, the Omaha Water Company to present to them for their consideration and for them to act upon in arriving at their estimate of the value of the water works plant of the complainant, certain documentary evidence, consisting of books and records, with the understanding and agreement that the said City of Omaha, the Water Board of the City of Omaha, and all of the representatives of the said City of Omaha should not be allowed to have access to the same, nor to know what was disclosed thereby; and that the same were received by the said Mead and Benzenburg and acted upon over the protest of the City of Omaha and the Water Board of the City of Omaha; and that the said engineers, Mead and Benzenburg acted upon said evidence thus secretly and wrongfully produced before them, and that their said award and estimate of valuation was in large measure based upon what was disclosed by said secret evidence, to which the City of Omaha nor its representatives had access; and that by reason of said actions, and the grossly wrongful and irregular procedure of said Mead and Benzenburg, the said estimate of value is fraudulent and void, and in no manner binding upon the defendant.

XXI.

The defendant further shows to the Court that the said Mead and Benzenburg, after having received secret evidence in the way of books, records and papers belonging to the Omaha Water Company, to which the City of Omaha or its representatives were not given access, and did not have a chance to examine, the said Mead and Benzenburg submitted the same to some auditor or bookkeeper in the City of Chicago, unknown to the City of Omaha, and secured
33 from said auditor or bookkeeper some tabulation of the said books, papers and evidence, without right or authority under the law so to do; and that the said Mead and Benzenburg, in a large measure, in arriving at their estimate of the value of the works of the Omaha Water Company relied upon and acted upon the said report of said bookkeeper or auditor chosen by them without authority of the City of Omaha, and without the representatives of said City having any opportunity to know what said report showed;

and that by reason of the premise, said estimate, award and report of said appraisers is fraudulent and void and not binding upon the City of Omaha.

XXII.

The defendant further shows to the Court that the said engineers, Daniel W. Mead and George H. Benzenburg, in arriving at their estimate of the value of the Omaha Water Works arrived at the same by considering solely and only the cost of reduplication of said works, deducting therefrom for depreciation on account of age, decay and other matters, and adding thereto a large sum for what they termed "going value"; and that the said engineers refused to consider any other element of value, but adopted the method which is known as the method of determining the cost of reproduction or reduplication as the sole and only method of determining the value of said works, and that their said award of value is based upon and determined solely by a consideration of the cost of reproduction, when in truth and in fact they should have taken into consideration in determining the value of said Omaha water works plant sundry others matters, to-wit: the value of its stocks and bonds; the value based upon its income; the cost of reconstructing another equally effective plant and other matters of like kind.

The defendant further shows that by reason of the adoption of said method as an arbitrary one, and by reason of the failure of said engineers to take into consideration the aforesaid facts, the said engineers were led to place a grossly excessive value upon said works of the Omaha Water Company; and that by reason of the fact that the said engineers refused and failed to consider matters and things which were proper and ought to have been considered by them in determining the value of said works, but instead thereof adopted an arbitrary method which resulted in a large and excessive valuation, the said estimate and report is fraudulent, and void and in no way binding upon the defendant.

XXIII.

34 The said defendant further shows to the Court that the said report of valuation of the engineers, Mead and Benzenburg, was made as of July 7th, 1906, when in truth and in fact the City of Omaha elected to purchase said plant on March 3rd, 1903; and that between said date of election to purchase and the time of the report of said appraisers the price of materials entering into the construction of a water works plant had been greatly increased and enhanced; and that the said engineers were required under and by virtue of their appointment and the law in the case, to make and return an estimate of value as of the date when the said City elected to purchase said plant, and that by reason of said fact, that said estimate is not and does not purport to be an estimate of the valuation as of the date of the election to purchase said plant by the City, the said report is null and void, and in no manner binding upon the defendant.

XXIV.

The defendant further shows to the court that more than three years elapsed between the time when the City of Omaha elected to purchase said water plant and the time when the said engineers, Mead and Benzenberg, filed a report of the estimate of said two engineers of the value of said water works, and that during said time the prices of material entering into the construction of water works plants had largely increased, and that during said period of three years the Omaha Water Company had continually and repeatedly sought delays in said appraisement, and which were consented to by said Mead and Benzenberg, until such time as the prices of materials entering into the construction of a water works plant had reached a very high figure; and that by reason of the fact that more than three years had elapsed between the time of the defendant's election to purchase said plant and the time of the return of the estimate of value by said two engineers, and the increased value of material in the meantime, as above pleaded, the said estimate is null and void and of no effect, and not binding upon the said defendant.

XXV.

The defendant further avers that the said engineers, Mead and Benzenberg, in estimating the value of the water works disregarded the real and actual value of the property of the Omaha Water Company lying and being within the East Omaha Land Company, South Omaha, Dundee and Florence, or necessary and appurtenant to the supply of East Omaha, South Omaha, Dundee and Florence, with water, and minimized the value of said property to the end that

35 their estimate of the value of the property of the Omaha Water Company within the corporate limits of the City of Omaha, and the in-take and source of supply at Florence should thereby be increased and enhanced, and that the said Mead and Benzenberg thereby unjustly, improperly, illegally and wrongfully did increase the value of the waterworks within the corporate limits of the City of Omaha much beyond their real value, and to the end and with the intent and purpose that if the City of Omaha should only be required to purchase and should purchase the property of the Omaha Water Company within the corporate limits of the City of Omaha, including the pumping station and source of supply at Florence, that the City of Omaha would be required to pay for that part of the water works substantially the full value of the entire plant, and which manner of valuation was unfair to the City of Omaha, and was in the interest of the Omaha Water Company.

The defendant further alleges that the said Mead and Benzenberg in so arriving at and in so apportioning the values of the properties in their respective localities failed to consider and ignored as an element of value the large income of the Omaha Water Company from water supplied to East Omaha, South Omaha, Dundee and Florence. In this connection the defendant further alleges that about one-third of all the water pumped by the Omaha Water Company is supplied to the City of South Omaha, its inhabitants

and industries therein situate, and about one-fifth of its entire income is derived from water supplied to South Omaha, its inhabitants and industries, and which fact added greatly to the value of the property of the complainant company in South Omaha, and which said facts the said Mead and Benzenberg should have taken into account in estimating the value of the property of the plaintiff company in South Omaha, but which facts the said Mead and Benzenberg refused to consider in estimating the value of the property of the complainant company in South Omaha.

The defendant further alleges for the like reasons the said Mead and Benzenberg failed to consider the rents, incomes and profits arising from the supply of water to East Omaha, Dundee and Florence, and which illegal and wrongful method of valuation the defendant avers was done at the instance and for the benefit of the Omaha Water Company, and to the prejudice and great wrong of the defendant.

XXVI.

The defendant further alleges that the said pretended report of appraisalment by the said Mead and Benzenberg is illegal
36 and void, in that the said Mead and Benzenberg added to the value of the water works a large sum of money representing what they termed "going value," to-wit—the sum of \$562,712.45. Whereas, under the terms and provisions of Section 14 of Ordinance No. 423, and of the said contract between the Water Company and the City of Omaha, the City of Omaha was not required to pay and the Omaha Water Company is not entitled to have and receive any sum of money for "going value," and the said Mead and Benzenberg acted illegally, unlawfully and wrongfully, by including the said sum of money representing "going value," in their said pretended appraisalment, and by reason whereof, their said pretended report of appraisalment was and is illegal, null and void.

XXVII.

The defendant further shows to the Court that the said report of said two engineers, Mead and Benzenberg, is incomplete, and it is impossible to tell from said report and estimate of said two engineers what sum should be paid by the City of Omaha to the Omaha Water Company for the water works within the City of Omaha, and necessary and appurtenant for the supplying of water to the City of Omaha and the inhabitants thereof.

XXVIII.

The defendant herein admits that some sort of a deed was tendered by the complainant to the Mayor of the defendant City on July 9th, 1906; but as to whether the same was good and sufficient, or properly executed, or in due form, the defendant has no knowledge upon which to base a belief, and therefore denies the same.

The defendant admits that a deed was tendered, purporting to convey all of the system of the water works of the complainant company, including the parts thereof located within and necessary and appurtenant to the supplying of water to South Omaha, Dundee,

Florence and the East Omaha Land Company; and the defendant avers that it was without authority to receive or accept of a deed conveying to it the said properties lying within or necessary and appurtenant to the supplying of water to South Omaha, Dundee, Florence and the East Omaha Land Company; and that the City of Omaha was without authority in law to pay for the said properties, or to contract an obligation to pay for said properties lying and being within South Omaha, Dundee, Florence, and the East Omaha Land Company, or necessary and appurtenant to supplying the same with water.

37 And the defendant further admits that it has not at any time paid the said sum of \$6,263,295.49, and that it has refused to pay the same, and that it still refuses to pay the same

XXIX.

The defendant further alleges that the said pretended report of the engineers, Mead and Benzenberg, was and is illegal, null and void, for the various and many reasons hereinbefore pleaded, and on account whereof the Water Board of the City of Omaha as soon as may be after the coming down of said pretended report of Mead and Benzenberg, and at the first meeting of the Water Board of the City of Omaha held thereafter, and under and by virtue of the power vested in the Water Board of the City of Omaha, did on the 9th day of July, 1906, pass a resolution whereby and wherein it rejected the said pretended report of valuation made by the said Mead and Benzenberg.

The said defendant further alleges that the Water Board of the City of Omaha, under and by virtue of the power in it vested, and to the end that a legal and valid appraisalment of said water works might be had, did on or about the 9th day of July, 1906, adopt a resolution providing for the appointment of an engineer to act for and in behalf of the City of Omaha in the making of a re-appraisalment of the water works within and necessary and appurtenant to supplying the City of Omaha with water and notifying the Omaha Water Company that the said report so signed by said Mead and Benzenberg was rejected, and that the Omaha Water Company be requested to select an engineer as appraiser on its part, so that a new appraisalment might be begun and proceeded with in a regular and proper manner, and with all convenient speed. That subsequently, and on the 25th day of July, 1906, the Water Board of the City of Omaha did appoint and select Mortimer E. Cooley, an engineer of Detroit, Michigan, to act for and in behalf of the City of Omaha in the making of said appraisalment of the water works, and did then and there request of the Omaha Water Company that it appoint an engineer on its part within twenty (20) days from the said date, and that the two engineers so selected should select a third, that the appraisalment might be proceeded with in conformity to and in compliance with the provisions of Section 14 of Ordinance No. 423, and of all which matters and things in this paragraph set down the Omaha Water Company was duly advised.

The defendant further alleges that the Omaha Water Company has refused, failed and neglected to appoint an engineer on its part to proceed with the appraisal; and the defendant avers
38 that the Omaha Water Company does not mean or intend to appoint an engineer on its part, and does not mean or intend that any such appraisal shall be made or had.

The defendant further avers under the advice of counsel that the Omaha Water Company, by reason of its failure and refusal to appoint an engineer to act as appraiser and by reason of its failure and refusal to proceed with said appraisal, has forfeited its right to insist upon a performance by the City of Omaha of its election to purchase the water works, and is estopped from insisting that the City of Omaha shall purchase the water works, and by reason of the premises is not entitled to the relief prayed for in its Bill of Complaint.

XXX.

This defendant further alleges that the said Mead and Benzenberg in their said pretended report of the valuation of the water works, in addition to the cost of the reduplication of the same, added thereto on account of "going value", the sum of money above pleaded, and also illegally, wrongfully, and unlawfully added thereto an additional sum of money, to-wit: the sum of two hundred and twenty-five thousand dollars, under the pretense of said sum representing interest on the investment during the progress of construction; and the defendant alleges that under the terms and provisions of Section 14 of Ordinance No. 423, the Water Company was not, and is not, entitled to have or receive any sum of money under the guise of or representing interest on the investment, and by reason of the fact that the said Mead and Benzenberg so wrongfully, unlawfully and illegally included in their said estimate the sum of \$225,000.00 for interest, their said purported appraisal was and is illegal, null and void.

XXXI.

The defendant further alleges that the said Mead and Benzenberg in their said pretended report of valuation in the sum of \$6,263,295.49, unlawfully, improperly and illegally included therein properties and real estate not connected with or necessary or appurtenant to the water works for the supplying of water to the City of Omaha and the inhabitants thereof, and included in said estimate or valuation certain real estate and properties to which the Omaha Water Company did not have and has not title; and by reason of which, said valuation is excessive, illegal, null and void.

And that said Mead and Benzenberg illegally and wrongfully included in their estimate of valuation large sums of money for expenditures and improvements supposed to have been made by
39 the Omaha Water Company, which were not necessary to the said water works, or its proper operation or maintenance, but to the contrary were useless, extravagant and wasteful.

XXXII.

This defendant for further answer denies each and singular all the averments in the complainant's bill of complaint not hereinbefore denied or specially pleaded unto, and denies that the complainant is entitled to the relief, or any part thereof in the said bill of complaint demanded; and this defendant prays the same advantage of this answer as if it had demurred to the said bill of complaint, and this defendant prays leave to be dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

C. C. WRIGHT,
HARRY E. BURNHAM,
City Att'y, Solicitors for Defendant.
JOHN L. WEBSTER,
Of Counsel.

Endorsed: Filed Sep. 3, 1906. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 1st day of October 1906, Replication was filed in said case, which said Replication is in words and figures following, to-wit:

U. S. Circuit Court, District of Nebraska.

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

No. 74. Doc. "X."

OMAHA WATER CO.

v.

CITY OF OMAHA.

The Replication of Omaha Water Company, Plaintiff, to the Answer of the City of Omaha, Defendant.

The replicant, saving and reserving to itself, all, and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer, of the defendant, for the replication thereunto, says that it does and will aver, maintain and prove said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things
40 this replicant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

HALL & STOUT,
Solicitors for Complainant.

Endorsed: Filed Oct. 1, 1906. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 15th day of January, 1907, Testimony of Theodore C. Woodbury was filed in said case, which said Testimony is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska.

No. 74. Docket "X."

THE OMAHA WATER COMPANY, Complainant,
v.
THE CITY OF OMAHA et al., Defendant.

It is hereby stipulated and agreed by and between the parties hereto that the testimony of Theodore C. Woodbury may be taken by agreement on behalf of the Complainant, notice and all irregularities in the form and manner of taking it being hereby waived.

R. S. Hall, appearing for the Complainant.

C. C. Wright for the Defendant.

THEODORE C. WOODBURY, of lawful age, being first duly sworn, deposes and says:

Q. You may state your name, Mr. Woodbury?

A. Theodore C. Woodbury.

Q. What official position do you hold, Mr. Woodbury?

A. President of the Omaha Water Company.

Q. Do you know James C. Dahlman, Mayor of Omaha?

A. I do.

Q. You may state, Mr. Woodbury, whether on the 9th day of July, 1906, you met Mr. Dahlman?

A. I did.

Q. Where did you meet him?

A. In his office.

Q. I will show you a paper which I ask the reporter to mark "Exhibit ZZ," being a deed of the Omaha Water property, and ask you to state whether you had that paper with you at the time you saw Mayor Dahlman?

A. I did.

Q. You may now state what you did in respect to that deed at that time?

A. I offered him the deed to the property of the Omaha Water Company and asked for a check.

41 Q. For what amount?

A. \$6,263,395.49.

Q. What did that sum of money represent?

(Objection by Mr. Wright that it is calling for a conclusion of the witness and immaterial.)

A. The appraisement of the Omaha Water Plant.

Q. That is the amount of that appraisement as found by the appraisers?

(Objected to by Mr. Wright, — calling for the conclusion of the witness.)

A. Yes.

Q. What did Mr. Dahlman say?

A. He refused to give me the check and accept the deed.

Q. Where was this—in what building, Mr. Woodbury?

A. In the City Building of Omaha.

Q. City Hall?

A. At the Mayor's office.

Q. Mayor Dahlman's office?

A. Mayor Dahlman's office.

Q. From the office of Mayor Dahlman, where did you go?

A. To the United States National Bank.

Q. Did you have the deed with you?

A. I did.

Q. Who did you see at the United States National Bank?

A. Mr. Barlow.

Q. Mr. Milton T. Barlow?

A. Mr. Milton T. Barlow.

Q. What official position did Mr. Milton T. Barlow occupy at that time?

A. Chairman of the Water Board of the City of Omaha.

Q. What did you say to him?

A. I tendered him the deed and asked for a check for the amount of \$6,263,295.49.

Q. What did he say?

A. He refused it.

Q. I will offer in evidence the deed marked ZZ, as referred to by the witness.

(Objected to by Mr. Wright as incompetent and immaterial because the petition in this case does not state cause of action or entitle complainant to the relief prayed for.)

Q. I will ask the reporter to make a copy of this deed and attach it to the deposition.

(Deed produced and marked "ZZ" by the reporter.)

Cross-examination.

By Mr. WRIGHT:

Q. Mr. Woodbury where was this deed prepared?

A. In New York.

Q. When.

42 A. I do not know.

Q. Where were you on the 7th day of July, 1906?

A. I was in Chicago.

Q. Did you have the deed with you then?

A. I did not.

Q. Had you had the deed before that time?

A. I had.

Q. Was it executed before that time?

- A. It was not.
- Q. Where did you sign the deed?
- A. At the Omaha Water Company Office.
- Q. Before whom?
- A. I do not remember.
- Q. Do you know the Notary?
- A. I knew him at that time. Mr. Hall introduced me to him in his office.
- Q. Who was the Secretary of the Water Company?
- A. At that time or now?
- Q. Then?
- A. Eben Stevens or Howard Mansfield.
- Q. Were they present at Omaha with you?
- A. They were not.
- Q. The deed had the signature of the Secretary prior to that time?
- A. I do not remember.
- Q. Was the seal of the Company attached to that deed?
- A. It was.
- Q. Who has charge of the seal of the Company?
- A. I had charge of it at that time.
- Q. You attached the seal, did you?
- A. I attached the seal.
- Q. The Secretary did not attach the seal?
- A. He did not.
- Q. And if he signed it at all it was signed by him prior to the 7th day of July?
- A. It was.
- Q. You did not know the amount on the 7th day of July?
- A. I did not know it on the 7th day of July.
- Q. Did you know it before you left Chicago on the 7th day of July?
- A. I did not.
- Q. You did not know it then prior to the 7th day of July?
- A. I did not.
- Q. Then it was filled in with the amount after you reached Omaha?
- A. It was.
- Q. Then at the time the Secretary signed the deed, if he did sign it, there was no amount filled in?
- A. No.
- Q. It was then a blank deed?
- A. It was.
- Q. When was the resolution to which reference was made passed?
- A. I do not remember.
- Q. How long prior to the 9th of July, 1906?
- A. I do not remember.
- Q. One month?
- A. It was within three months.
- Q. Your son is now acting Secretary of the Company?
- A. My son?
- Q. Yes.
- A. No.

Q. I thought you said your son was.

A. I did not say my son.

Q. Who is Secretary now?

A. Howard Mansfield.

Q. He is the Attorney for the Company?

A. General Counsel.

Q. He has charge of the records and papers belonging to the Company?

A. He has.

Q. At the time the resolution was passed, to which you refer, you nor the Company did not know what the valuation would be did you?

A. We did not.

Q. Do you recall who witnessed the signature of the Secretary?

A. I do not.

Redirect examination.

By Mr. HALL:

Q. Mr. Woodbury, you say the deed was prepared in New York. Is it not true that the draft of that deed was passed several times between Omaha and New York?

A. It was.

Q. And examined by counsel in both places?

A. It was.

Recross-examination:

By Mr. WRIGHT:

Q. Was the signature of the Secretary on the deed when it was passed between Counsel between Omaha and New York?

A. No.

Q. Did you see the Secretary sign that deed?

A. I do not remember.

THEODORE C. WOODBURY.

Endorsed: Filed Jan. 15, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 8th day of February, 1907, Stipulation was filed in said case, which said Stipulation is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

OMAHA WATER COMPANY, Plaintiff,

vs.

CITY OF OMAHA et al., Defendants.

Stipulation.

It is hereby stipulated and agreed that either party in the above cause may offer any deed or record pertaining to the property of the Omaha Water Company and the same may be received upon

44 the hearing as if offered regularly, objections to the formal proof being waived and either party may offer any certified ordinance on the hearing relating to the Omaha Water Company's transactions with any of the municipalities in Omaha or adjoining.

It is further stipulated that the City of Omaha may offer a map of the lines in the East Omaha District which are claimed by it to pass into Iowa. The same may be received without formal proof.

HALL & STOUT,
Attorneys for Plaintiff.
C. C. WRIGHT,
JNO. L. WEBSTER,
Attorneys for Defendants.

Endorsed: Filed Feb. 8, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 8th day of February, 1907, Stipulation was filed in said case, which said Stipulation is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

OMAHA WATER COMPANY, Plaintiff,
vs.
CITY OF OMAHA et al., Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action, that the time of the taking of the testimony shall be and is hereby extended until and including the 28th day of February, 1907, and that either party may take such testimony as it desires to take prior to said date.

This stipulation is to supersede all prior stipulations and agreements as to the taking of testimony.

HALL & STOUT,
Attorneys for Plaintiff.
C. C. WRIGHT,
JNO. L. WEBSTER,
Attorneys for Defendants.

Endorsed: Filed Feb. 8, 1907. Geo. H. Thummel, Clerk.

45 Thereupon afterwards, to-wit: On the 2nd day of March, 1907, Depositions of Frederick Sargent et al., were filed in said case, which said Depositions are in words and figures following, to-wit:

In the United States Circuit Court, District of Nebraska.

THE OMAHA WATER COMPANY, Complainant,
vs.
THE CITY OF OMAHA, Defendant.

Depositions of sundry witnesses were taken before me, O. M.

Hulse, a Notary Public in and for Cook County, Illinois, on this 27th day of February, 1907, by and under the following stipulation and agreement:

It was stipulated and agreed in my presence that the testimony of Frederick Sargent, Charles B. Burdick and E. C. Shankland might be taken before me, O. M. Hulse, all questions of notice for time of taking same being hereby waived by R. S. Hall, Attorney for the Omaha Water Company, and C. C. Wright, Attorney for the City of Omaha.

[SEAL.]

O. M. HULSE.

FREDERICK SARGENT, being first duly sworn, was examined by Mr. Wright and testified as follows:

Q. Please state your name and occupation.

A. Frederick Sargent. I am a Consulting Engineer, mechanical and electrical.

Q. Where is your residence and place of business?

A. My residence is at Glencoe, Illinois, and my place of business 1720 Railway Exchange Building, Chicago.

Q. How long, Mr. *Shankland*, have you been in the engineering business? Just state generally what your experience has been so that the court may know?

A. I have been in the engineering business approximately thirty years. My first experience was as a marine engineer in Glasgow, Scotland, in which service I was employed for seven years. I have worked as a designing engineer for Nafey & Levy, shipbuilders of Philadelphia; also as draughtsman for Robert Wetherell & Company of Chester, Pennsylvania. I was employed by this firm for about two years to design water works pumping engines. I was employed by Allis-Chalmers Company of Milwaukee in a similar capacity as draughtsman and designing general machinery. I have been Chief Engineer of the Western Edison Light Co., Chief Engineer and General Superintendent of the Chicago Edison Company; Chief Engineer of the Edison Company of New York; Chief Engineer of the World's Columbian Exposition, Chicago, having charge of both the mechanical and electrical installations. In the year 1903 I went into business for myself as a Consulting Mechanical and Electrical Engineer.

46 Q. Are you acquainted with Mr. John W. Alvord of this city?

A. Yes sir.

Q. How long have you known him?

A. I have known Mr. Alvord since in 1893 when we were associated at the World's Columbian Exposition.

Q. Since that time have you been in a general way familiar with his work and experience?

Objection by Mr. Hall.

A. Yes, in a general way, I have.

Q. Do you know what his reputation and standing is among engineers as a hydraulic engineer, and for integrity and ability in that line.

Objection by Mr. Hall.

A. Yes, I have always known Mr. Alvord's reputation to be good, and his standing generally as an engineer I have always known to be good.

Q. Do you know from your own knowledge as to his character and ability as an engineer?

Objection by Mr. Hall on the ground that the question is incompetent, irrelevant and immaterial.

A. Yes sir.

Q. What would you say it was?

Objection by Mr. Hall.

A. His character was good, and as to his work, we often have hydraulic work and require the services of an expert in that line. We have employed Mr. Alvord on several occasions in connection with such work.

Cross-examination.

By Mr. HALL:

Q. Do you know what Mr. Alvord's specialty is?

A. Yes sir.

Q. What is it?

A. As I understand it, Mr. Alvord's specialty is sewerage and water works?

Q. Isn't his specialty as a Sanitary Engineer; doesn't he so advertise himself?

A. I am not sure but what he does.

Q. Don't you know?

A. No.

Q. Don't you know how Mr. Alvord advertises himself?

A. No, I am not sure how he advertises himself.

Q. Aren't you well acquainted with his business and don't you know how he advertises?

47 A. No, I really have never seen his card—I don't remember ever seeing his card.

Q. Well, you have talked with him enough to know what he makes a specialty of?

Objected to by Mr. Wright.

A. Yes, I think so.

Q. Well, isn't it true that he makes a specialty and so advertises himself as a sanitary engineer?

Objected to by Mr. Wright.

A. I don't know whether he does or not.

Q. Well, you are not intimately acquainted with his business then?

A. I am intimately acquainted with Mr. Alvord personally and know what he does to a certain extent.

Objection by Mr. Wright.

Q. I would call your attention to the fact that I am asking the question as to your knowledge of his business. What I am asking you Mr. Sargent is whether you are acquainted with Mr. Alvord's business so as to know what he makes a specialty of in his advertising?

A. I only know of Mr. Alvord's work and not of his advertising.

Q. The hydraulic work that you spoke about was mostly in connection with sewers, was it not?

A. No sir, with water works.

Q. What water works did you employ him on?

A. New Albany, Indiana; Oak Park Water Works, a suburb of Chicago, the La Grange Water Works, a suburb of Chicago, and the Blue Island Water Works, a suburb of Chicago.

Q. Has he been pretty constantly in your employ?

A. No sir, only periodically.

Q. Do you know Mr. George Benzenberg?

Objected to as immaterial.

A. Yes sir.

Q. What would you say as to his character and standing as an engineer?

A. I should say it was excellent.

Q. Do you know what position he occupies now?

Objected to by Mr. Wright as incompetent, irrelevant and immaterial.

A. I understand he has a prominent position in Cincinnati.

48 Q. I am speaking of his position and standing as an engineer?

A. I am not sure.

Objection by Mr. Wright.

Q. You don't know what it is?

A. No, I am not sure.

Q. Well, he occupies a front rank in his profession, doesn't he?

A. I think so.

Objection by Mr. Wright.

Q. Do you know Mr. D. W. Mead?

Objection by Mr. Wright.

A. Yes sir.

Q. Do you know him pretty well?

A. Not very well, I have known him for several years.

Q. Do you know of his standing as an engineer?

Objected to by Mr. Wright.

A. Only in a general way.

Q. What would you say it was?

A. I should say he was a man of good standing and good reputation?

The signature of the witness to the foregoing deposition is waived by agreement of counsel.

In the United States Circuit Court, District of Nebraska.

STATE OF ILLINOIS,

County of Cook:

THE OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

E. C. SHANKLAND, being first duly sworn, was examined by Mr. Wright and testified as follows:

Q. Please state your name and occupation?

A. My name is Edward C. Shankland, and I am a Civil Engineer.

Q. Where do you reside, and where is your place of business?

A. I live in Chicago, and my business address is 1106 The Rookery Building, Chicago.

Q. How long have you been a resident of Chicago?

A. Since the year 1889.

Q. How long have you been engaged in the business of Civil Engineering?

49 A. Since graduating from the Renssaeler Polytechnic Institute of Troy, New York, in 1878.

Q. How long have you been located in Chicago?

A. Since 1889.

Q. In order that we will have it before the Court, I would ask you to state your experience as a Civil Engineer, and on what work you have been engaged. Just in a general way?

A. In government service on the Missouri and Mississippi Rivers for 5 years; bridge work in Canton, Ohio, and Pittsburg, Pennsylvania, for six years; since then have been with Burnham & Root, and with D. H. Burnham & Company, Architects, Chicago, as their engineer, and for the last eight years in business for myself as structural engineer.

Q. Are you acquainted with John W. Alford?

A. Yes, I am.

Q. How long have you known him?

A. I have known Mr. Alvord for 17 years.

Q. Are you familiar in a general way with the class of work he does in his work?

A. I am.

Q. Do you know his reputation among engineers as being an engineer of ability, in good standing, and a man of integrity?

Objected to by Mr. Hall.

A. I do.

Q. What would you say his reputation was among engineers as to his ability and integrity?

A. He stands very high—in fact he is in the front rank of engineers in his line.

Q. What is his line?

A. Sanitary Water Works. That is the work he does generally.

Q. From your knowledge of the work he does generally, do you know of your own information, as to his character and ability as an engineer?

Objected to by Mr. Hall.

A. I do.

Q. What would you say it is?

Objection.

A. I would say it was the best.

50 Cross-examination.

By Mr. HALL.

Q. What is your particular line, Mr. Shankland?

A. Building.

Q. What you would call "structural Engineering?"

A. Yes.

Q. Do you know Geo. H. Benzenberg?

Objection.

A. I do not, except by reputation.

Q. Do you know his reputation among engineers?

Objected to by Mr. Wright, on the ground that it is not proper cross-examination.

A. Yes.

Q. Would you call it first-class?

Objected to by Mr. Wright:

A. Yes, I think I would.

Q. Do you know Mr. D. W. Mead?

A. I do not.

Q. Do you know Mr. Alvord personally?

A. Yes.

Q. Do you know Mr. D. W. Mead's reputation among engineers?

Objected to by Mr. Wright on the ground that it is incompetent, irrelevant and immaterial.

A. Not as well as I do the others. From what I have heard it has always been to his credit.

Q. You have been more associated with Mr. Alvord, I believe?

A. Well, during the World's Fair, I was, but since that time have not been much.

Q. Do you know anything about his work except in connection with the World's Fair?

A. No, except in a general way.

Q. Personally?

A. No.

Q. His work at the World's Fair was in connection with the sewerage?

A. Yes, and drainage.

Q. That is the extent of your knowledge of Mr. Alvord, as a matter of fact, and the other is a matter of report, is it not?

A. The other is a matter of very close report because we have had occasion several times——

Q. Well, it is a report—it is not personal knowledge?

A. No.

The signature of the witness to the foregoing deposition is waived by agreement of counsel.

In the United States Circuit Court, District of Nebraska.

51 THE OMAHA WATER COMPANY, Complainant,
vs.
THE CITY OF OMAHA, Defendant.

STATE OF ILLINOIS,
County of Cook, ss:

CHARLES B. BURDICK, being first duly sworn, was examined by Mr. Wright and testified as follows:

Q. You live in Chicago, Mr. Burdick?

A. I do.

Q. What is your business?

A. Hydraulic and Sanitary Engineer.

Q. Your business is in Chicago?

A. Yes sir.

Q. With whom are you associated in business, if any one, now?

A. Mr. John W. Alvord.

Q. How long have you been associated with him in that business?

A. I first entered his office as an assistant in 1895 and remained with him until 1897. In 1902 I formed a partnership with him and have continued with him under that partnership up to the present time.

Q. And from 1895 have you been familiar with the work that he has done?

Objected to by Mr. Hall.

A. I am quite familiar with it, yes sir.

Q. I will ask you to state to the reporter what experience and work you know of his having in water works matters. I have here a memorandum you gave me.

Objected to by Mr. Hall on the ground that it is incompetent, irrelevant and immaterial.

A. During the time that I acted as assistant in his office from 1895 to 1897, Mr. Alvord was engaged as follows: Particularly in matters pertaining to water works or hydraulic engineering; as consulting engineer to contractors, Duluth Water Works Intake in 1895, as designing and constructing engineer on the Lockport Water Works, complete system of Water Works 1896; the design and construction of Water works Sharon, Wisconsin, 1896, designing and construction of water works Vicksburg, Michigan, 1896;

the design of betterment of water works, Holland, Michigan, 1897; consulting engineer to contractors on large reservoir Pittsburg Water Works, 1897-1898; I might say that he prepared the estimates upon which the work was taken by the contractors—that is, prepared the bid. From 1897 to 1902 I was not directly connected with his office. For the last five years I have been connected with him and know the books and office records to which I have frequently referred, and can say that Mr. Alvord was engaged upon water works and hydraulic work as follows: Belvidere, Illinois, 1899, Improvements to the water works; report on the betterment to the Seattle water works for prospective investors; report on improvements in water works, Tuscola, Illinois; complete system of water works, Eaton Rapids, Michigan, 1898; consulting engineer for the Lake Forest Water Works Company on various matters including the betterment of the plant; complete plans for system of water works for the town of Hammond, Indiana; he was also in 1902 employed by special commission by the City of St. Louis for examination of the operating expenses in St. Louis water works.

Q. Did you know during that time of his being connected with an appraisalment on the Dubuque water works?

A. Yes, in 1899 I was concerned in the work with him although in his employ.

Q. Do you know anything about his being engaged, during that time, as engineer on the Pittsburg, Pennsylvania, water works?

A. As I stated in my answer to one of your other questions, he was.

Q. And during the time that you were with him do you know anything about the Lockport, Illinois, works?

A. Yes, I told about that.

Q. Are there any others, during the time you were not there, that you have any knowledge of?

Objected to by Mr. Hall.

A. He was engaged on the water power at Wilmington, Illinois; also consulting engineer to the Board in charge of the Illinois-Michigan Canal, in connection with recommendations for developing the power at Lockport, and finally testifying in several suits in regard to complete power. He also reported on an irrigation project at Granges, Wyoming; he also advised the state in reference to navigation of the Illinois River; he was engaged on other hydraulic work at Union City, Michigan, where he made a report on the development of power, also at Gainesville, Georgia, and Ottawa, Illinois, where he made a report on the distribution of water of the various hydraulic companies.

Q. When did you commence working for him the last time?

A. I went into partnership with him in October, 1902.

Q. Have you known of Mr. Alvord's connection with any water works matters since that time?

A. Yes, from 1902 to date, among the more important matters in reference to water works and other hydraulic matter, I would mention the following: As Consulting Engineer for the Chicago Clearing and Transfer Co., he reported on water supplies for their proposed improvements to clearing, designing special

pumps for their developing the supply; he has been for the past five years consulting engineer for the Davenport water works, including recommendations as to miscellaneous improvements and valuations of the plant; he has been consulted in regard to the betterment of the plants at Carlinville, Illinois, water works; Petoskey, Michigan, water works and electric light plant; Elgin, Illinois water works; also a complete system of waterworks for the town of Saugatuck, Michigan; in 1903 he reported upon the development of water power at Marseilles, Illinois; and the developing of water power on Big River near De Soto, Missouri; he designed and supervised the construction of improvements in the hydraulic plant for the Des Moines Edison Light Company. In 1904 Mr. Alvord represented the Lincoln Park Board on Shore Protection for their proposed park extension; he was expert witness for the State of Missouri in the drainage canal litigation; he reported on a water supply near Montreal; the improvement in the Richmond, Indiana, water works; the improvement in the New Albany Water Works in their consolidation with the supply of Jeffersonville, Indiana; he had charge of the plans and supervision of the large storage reservoir Mt. Vernon Water Works, Mt. Vernon, Illinois; recommendation for improvement in the Elkhart, Indiana, water works and for the American Water Works & Guaranty Company; recommendations for the control of the great Maumee River for the National Cash Register Company, Dayton, Ohio; improvements in the water works system at La Grange, Illinois, for Sargent & Lundy, engineers of this city; reported on supply of water for the Chicago Union Stock Yards; reported on improvements in the water supply for the town of Muncie, Indiana, for the American Water Works & Guaranty Company; Oak Park water supply, Cedar Rapids improvements; also improvements at Harvey, Terre Haute, Indiana, and Franklin and Worthington, Indiana; also reported on the development of water power at Flint River, Michigan, and upon Flint River near Montrose, Michigan; and he is at present designing for the United States Steel Company at Gerry, Indiana.

During this time he has also been engaged on valuations and as a member of appraisal boards at the following places: Dubuque, 1899; Sheboygan, Wisconsin, 1900; Marysville, Ohio, 1901; Valparaiso, Indiana, as expert witness in appraisal proceedings as a member of the board in Lake Forest, 1902; as an expert witness in valuation and rate against Rogers Park, 1902; appraisal in 54 Mobile, Alabama, in 1902; Flint, Michigan, in 1903, expert witness Waterville, Maine, in 1904; member of Board in the differences between the Company and contractor, Racine, 1903; expert valuation in rate against Kankakee, 1904, Quincy water works 1904; expert witness in rate against Mt. Vernon, Illinois, water works 1905. He was also a member of the board of appraisals at Baton Rouge, Louisiana, North Platte, Nebraska, last year, and Fergus Falls, Minnesota, this year.

Q. Did you mention his connection with the Davenport appraisalment?

A. Yes. I would say in addition to the matters I have mentioned, that he has been engaged on a good many minor matters, and a good many matters along the line of sewerage.

Q. Your answer has been confined to hydraulic matters?

A. Yes entirely.

Cross-examination.

By Mr. HALL:

Q. Have you omitted anything Mr. Alvord has been engaged in, Mr. Burdick?

A. Yes, there were a good many matters I didn't mention.

Q. But any matter that you thought of any importance at all you mentioned?

A. I mentioned any matters that occurred to me.

Q. Can you think of any that you forgot?

A. No sir.

Q. Then you have given all you can remember?

A. Well, all I think of.

Q. All you can remember now, I mean?

A. Yes, all I remember now.

Q. Then there is no misunderstanding between us if you have given all that you can remember now?

A. I don't think of any other matters.

Q. Would you say that Mr. Alvord was a professional appraiser?

A. I don't know that I understand the definition of "professional appraiser".

Q. Well, one who makes a specialty of going into appraisements.

A. I would not say that.

Q. I notice that you have given instances where he has been employed as an expert witness in appraisement matters?

A. Yes, that was frequent with Mr. Alvord.

Q. And these appraisements and expert witness matters that you have spoken of have taken a great portion of his time in the last few years, have they not?

Objected to by Mr. Wright.

A. Yes, a considerable proportion of his time.

Q. A great proportion, have they not?

A. No.

55 Q. You can't think that he has done these things and not taken the greater part of his time?

A. I spoke of a good many things aside from appraisements.

Q. I am speaking now of the appraisal and expert witness matters that you have spoken about? I ask you and hope you will just answer the question? I notice that you have given during a comparatively short length of time, a large number of appraisals in which you say Mr. Alvord was engaged, also a great number of times where he acted as expert witness, those times being in a great measure, during the period covered by your testimony. Now referring to that testimony and that period of time, I would ask you whether he did not spend a great proportion of his time in that particular line of business during that period?

A. What do you mean by great proportion?

Q. I mean more than he did on anything else during that time?

A. No; I would not say that; he spent perhaps a third of his time at that.

Q. Is that a guess or anything at all like accurate?

A. Well, I know pretty well what he is doing usually and should think that work took about one-third of his time; I have never made any figures, however.

Q. I understand. What is the first appraisement which you know of his being connected with?

A. Dubuque.

Q. He was employed there by Mr. Cole, was he not?

A. Yes, I believe Mr. Cole was his recommendation.

Q. Mr. Cole is his brother-in-law, isn't he?

A. Yes.

Q. Do you know what his work was at La Grange?

A. His work at La Grange was the examination of the existing plant and report as to the most desirable method of improvement to bettering the supply.

Q. And that was equally true at Oak Park was it not, as both projects were similar?

A. Yes.

Q. In both he was employed by Sargent & Lundy?

A. Yes.

Q. Were his recommendations adopted by Sargent & Lundy?

A. They were adopted at La Grange. I don't know about Oak Park. I don't believe any improvements have been made at Oak Park as yet, but I believe they are proceeding along the lines of his recommendations.

Q. Have there been any changes in the plans between what he proposed and what has been done?

A. There has been nothing done.

Q. There has been nothing done except the report made by him?

A. That is all.

53 Q. Do I understand that at La Grange his ideas were carried out?

A. Yes.

Q. You, I think, said you were now Mr. Alvord's partner?

A. Yes sir.

Q. That is all.

Mr. WRIGHT: Did you mention in your direct testimony, Mr. Burdick, your connection with the Omaha plant or that of Mr. Alvord?

A. He was connected with that, yes sir.

The signature of the witness to the foregoing deposition is waived by agreement of counsel.

STATE OF ILLINOIS,
County of Cook, ss:

I, O. M. Hulse, Notary Public and shorthand reporter, do hereby certify that the above and foregoing is a true and correct transcript of the evidence taken in shorthand upon examination of Frederick

Sargent, E. C. Shankland and Charles B. Burdick, by C. C. Wright and R. S. Hall, in Chicago, February 26th, 1907.

[SEAL.]

O. M. HULSE,
Notary Public.

Endorsed: This deposition was received by mail 3-3-07 and opened in open Court in pursuance of the order of Court this 2nd day of March, 1907. Geo. H. Thummel, Clerk. By John Nicholson, Deputy.

Endorsed: Filed Mar. 2, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 6th day of March 1907, Depositions of John A. Cole, et al., were filed in said case, which Depositions are in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska.

OMAHA WATER COMPANY, Complainant,
vs.
CITY OF OMAHA, Defendant.

Depositions taken in the above cause, in Room G 1, Auditorium Annex, Chicago, Illinois, Tuesday, February 12, 1907.

Present: Mr. R. S. Hall and Mr. Herbert C. Lakin, appearing for the complainants; Mr. John L. Webster and Mr. C. C. Wright, appearing for the defendant.

It is stipulated by the parties hereto that the testimony of John A. Cole, Isham Randolph, William S. MacHarg and L. W. Rundlett may be taken by agreement on behalf of the complainant, notice and all irregularities in the form and manner of taking said deposition being hereby waived.

JOHN A. COLE of lawful age, being first duly sworn as a witness on behalf of the complainant, deposes and says:

Direct examination.

By Mr. HALL:

Q 1. You may state your name?

A. John A. Cole.

Q. 2. Where did you live, Mr. Cole?

A. Chicago.

Q. 3. Have you been engaged in the water works business and in the study of hydraulics in connection with it?

A. I have.

Q. 4. You may state to what extent you have been so engaged, and for what length of time?

A. My connection with the water works began in 1862, in connection with the Boston water works. I began business in this city in connection with water works in 1874, and have been connected very generally with it until 1903.

Q. 5. During that time what plants have you been connected with, either as a builder or as connected with the estimation of the plants and their values?

A. I designed and built two of the present Chicago water works plants, the Lake View and the Hyde Park. I designed and built works at Kewanee, Illinois; Gibson, Illinois; Lake Forest, Illinois; Watertown, Wisconsin; Great Falls, Montana; and have thoroughly reconstructed several large works. I could name the others.

Q. 6. I would like to have you name them?

A. Brantford, Ontario; Terre Haute, Indiana; Minneapolis, Minnesota; Ludington, Michigan; Helena, Montana; Des Moines, Iowa; Ottumwa, Iowa; Oskaloosa, Iowa, and others.

Q. 7. Have you had the management of water plants also?

A. I have had the management of probably fifteen plants. I have acted as president for the Ottumwa, Iowa, and Des Moines, Iowa, water works, and vice president in charge at the Helena, Montana, water works. I have also carefully examined and reported frequently with advice on about 100, at least 100 plants in the United States, in all parts of the country.

Q. 8. In connection with such examinations have you been interested in any appraisements of water works plants?

A. As president I was interested in the appraisal of the Helena plant. As an appraiser I acted in the appraisal of the Topeka, Kansas, plant, and now am appraiser of the Kankakee, Illinois, plant, acting for the City. I think that perhaps is all
58 that I have been directly connected with as appraiser.

Q. 9. What connection did you have with the Dubuque appraisal?

A. I was consulting engineer for Dubuque, Iowa, and made all the preliminary arrangements for the appraisal.

Q. 10. In connection with that preliminary work did you formulate the plan of the showing on behalf of either of the parties?

A. Yes, I formulated the plan for the schedules for the company.

Q. 11. Are you acquainted with the Omaha water works plant?

A. I have seen it frequently. I know the city, and I know something about the plant. I have never made a special examination of the plant. I know it in that sense.

Q. 12. Did you see the plans and blue prints and details that constituted the inventory that was placed before the appraisers of that plant?

A. Yes, I saw them with much interest.

Q. 13. What would you say, Mr. Cole, from your knowledge and experience, would be the value and assistance of such an inventory, consisting of plans and blue prints such as were prepared for the Omaha water works appraisal and which you saw, in laying before the appraisers the property of the Omaha Water Company?

MR. WEBSTER: To which question the defendant objects for the following reasons: First, said testimony is incompetent and improper. Second, the said testimony sought by the question is irrelevant and immaterial. Third, the award made by the appraisers is not to be sustained by the testimony of experts or others as to the value

of the said blue prints and documents referred to in the question, nor by such testimony as to the value of the water works. Fourth, the question propounded to the witness calls for his opinion of valuation based upon blue prints, papers and documents which the question implies have been submitted to the Board of Appraisers, but which said blue prints and documents are not now presented to the witness and are not before the officer taking this deposition, and are not submitted to defendant's counsel for inspection or examination with reference thereto. Fifth, that it is not competent for this witness to testify as to the value of such plans and blue prints, or the effect they may have had, or the value the Board of Appraisers may have attached thereto in making their valuation of the water works.

(The last question was read.)

59 A. If those plans and schedules were absolutely correct they were indispensable in the work of the appraisers, in my judgment.

Mr. HALL:

Q. 14. What would you say as to whether the preparation of such plans and specifications would be a proper or improper way on the part of the company in laying before the appraisers its property?

Mr. WEBSTER: To which question the defendant makes the same objection as to the last preceding question.

It is understood that the like objection may be considered as being taken to each and singular all questions that may be asked the witness on the same line of examination, without having the objection formally repeated.

(The last question was read.)

A. It is a perfectly proper way if asked to do so by the appraisers.

Mr. HALL:

Q. —. Would it be an improper way in any view of it?

A. Not at all.

Q. 16. Do you know George H. Benzenberg, one of the appraisers?

A. I do.

Q. 17. How long have you known him?

A. Oh, I must have known him for fifteen years.

Q. 18. In what way have you been acquainted with him?

A. In his engineering work in Milwaukee and other cities, as I have known it through the engineering papers and through acquaintances and an occasional meeting with him.

Q. 19. What position does he occupy at present?

A. He is a consulting engineer of a number of cities. I know he has some important work on hand at present. He is also president of the American Society of Civil Engineers.

Q. 20. What have you to say as to his standing and reputation?

A. It is very high.

Q. 21. You may state his reputation and standing in the business in which he is engaged, if you know it?

Mr. WEBSTER: It is understood the objection heretofore made shall apply equally to the testimony of this witness, relating to the reputation and standing of Mr. Benzenberg.

Mr. HALL: That is satisfactory.

(Last question read.)

60 A. I hardly know how to answer a question of that kind. He has for many years been called upon as consulting engineer on matters of great importance in our leading cities. I know that among engineers he is very highly esteemed. I have never heard a word against his ability or his judgment or integrity.

Q. 22. Do you know Mr. D. W. Mead?

A. I do.

Q. 23. How well have you known him?

A. I have known him by reputation, by his writings, and by the business which he has done from the beginning of his engineering work.

Q. 24. Do you know what position Mr. Mead occupies at present?

A. Well, he occupies at present the position of professor of engineering in the University of Wisconsin. I don't know what other positions he may hold.

Q. 25. What is his standing among engineers?

Mr. WEBSTER: The objections heretofore made so far as applicable shall apply to such testimony as the witness shall give relating to the standing and reputation of Mr. Mead.

A. Mr. Mead is very highly esteemed as an engineer and a scholar and a practical man.

Mr. HALL:

Q. 26. Do these two men, Mr. Mead and Mr. Benzenberg, make any specialty in engineering work particularly, so far as you know?

A. I think their principal business for a good many years has been in connection with water works lines. They are both of them civil engineers, and qualified undoubtedly in other lines.

Q. 27. Then what you mean is that they are specialists in regard to water works and hydraulics?

A. Yes, I should consider them eminently specialists in those lines.

Q. 28. Mr. Cole, considering the standing of Mr. Mead and Mr. Benzenberg as specialists in water works and hydraulics, what would you say as to the weight to be attached to their judgment in respect to matters of that kind, or in estimates connected with those special matters about which you have testified?

A. I should consider it worthy of confidence.

Q. 29. In what degree would you consider it worthy of confidence?

A. In a very high degree.

Q. 30. That opinion which you have expressed would apply

equally as to any valuations placed by them upon any properties put under their investigation, would it not?

A. It would under water works properties, certainly.

61 Q. 31. When you were in Omaha you saw the Omaha water plant. I think you said, Mr. Cole?

A. I have seen parts of it. I don't think I have ever seen the entire plant of late years. I have never made any special attempt to see it. I have simply seen it in a casual way when I have been there.

Q. 32. Well, speaking of it in a general way, what would you say as to the condition of it, or don't you feel qualified to express an opinion about that?

A. I have no reason to think it is not an excellent plant in every respect. I do not know how far any examination I have made would warrant me in giving a statement as to its value.

Q. 33. No, I do not ask any statement as to its value at all. All I was directing your attention to was the general appearance of the plant, and what condition it appeared to be in.

A. It appeared to be in very fine condition, and well designed, well constructed. That was the impression left on my mind.

Mr. HALL: I think that is all.

Cross-examination.

By Mr. WEBSTER:

X Q. 1. Mr. Cole, you also know Mr. John Alvord?

A. I do.

X Q. 2. Is he a civil engineer of equal standing with Mr. Benzenberg and Mr. Mead in his special line of scientific work?

Mr. HALL: We object to all this as not proper cross examination, and this objection applies to all this line of examination.

A. I would like to have you define what his special line is, before I answer that question.

Mr. WEBSTER:

X Q. 3. Well, do you know yourself what his specialty is?

A. I don't know as I could answer that question.

X Q. 4. Well, you know him to be a civil engineer, do you not, of the City of Chicago?

A. I do.

X Q. 5. And you know that he has had to do with the planning and construction and appraisement of water works properties?

A. Yes, I know he has.

X Q. 6. Well, in that line of work you consider him to be in every way qualified and competent?

A. Yes, I think he is a competent engineer on those lines.

X Q. 7. Is not Mr. Alvord a member of the Executive Committee of the society or organization of which Mr. Benzenberg
62 is the president, mentioned in your testimony in chief?

Mr. HALL: Counsel desires to call the attention of the counsel on the other side to the fact that in making this examination they make

Mr. Cole their own witness, and this examination is not proper cross examination, and counsel will argue on the hearing before the court that to the extent of this examination Mr. Cole is their witness and not ours, there being no court here to which this objection can be addressed.

Mr. WEBSTER: I will take the answer to my question.
(The last question was read.)

A. I don't know. He is a member of the society, but that he is on a committee I don't know.

X Q. 8. Mr. Cole, when was it that you examined the blue prints and other documents referred to in your testimony?

A. I don't remember the exact date. It was in 1904.

X Q. 9. Where were these blue prints and documents when you made the examination?

A. They were in the water office in Omaha, shown me by Mr. Phillips.

X Q. 10. You mean by that, in the office of the Omaha Water Company in the City of Omaha?

A. In the office of the Omaha Water Company in the city of Omaha.

X Q. 11. And how came you to be there at that time?

A. I don't remember that. Yes, I remember now I was there to give testimony on the matter of meter rates.

X Q. 12. You are the same Mr. Cole who about that date made an affidavit which was filed in a suit then pending in the United States Circuit Court wherein the Omaha Water Company was plaintiff and the city of Omaha was defendant?

A. I am.

X Q. 13. At that time did you go from the city of Chicago to the City of Omaha for the purpose of making that affidavit and making the necessary preparation therefor?

A. I did.

X Q. 14. And at whose instance or request did you go to Omaha for that purpose?

A. The Water Company.

X Q. 15. And for which you received compensation?

A. I did.

X Q. 16. At that date what knowledge did you have that the blue prints and documents to which you have referred had ever been presented to the Board of Appraisers?

A. None.

X Q. 17. None, was that the answer?

A. Yes, none.

63 X Q. 18. Have you any personal knowledge that they at any time since that date have been presented to the Board of Appraisers?

A. I have not.

X Q. 19. Did you at that time have any information that these blue prints and plans and maps, etc., had been prepared for the purpose of being presented to the Board of Appraisers, and if so, from whom did you get that information?

A. Mr. Phillips had been in our employ for several years, and we let him go into the employment of the Water Company for the express purpose of making those schedules.

X Q. 20. Was Mr. Phillips the person who informed you of the use which was to be made of those blue prints and schedules?

A. Yes, he showed me the plans and schedules. It was a matter of interest to me.

X Q. 21. How many, if you can recollect, of these blue prints, plans or schedules did Mr. Phillips at that time exhibit to you?

A. A very large number. I would not undertake to say how many. They were very large maps and in profusion.

X Q. 22. Probably several hundred in number?

A. I could not tell. I looked at them simply as a matter of interest as an engineer. I did not attempt to count them or get any impression. The impression left upon my mind is that they were a very large number, and a very thorough-going piece of work that he had been engaged in for a long time.

X Q. 23. And Mr. Phillips had theretofore been employed in your office here in the City of Chicago?

A. Yes.

X Q. 24. Was he simply an employee of your office, or was he interested with you in the business of the office?

A. He was one of our assistant engineers.

X Q. 25. That don't quite answer my query. Working under a salary?

A. Yes, under a salary. He was a salaried man.

X Q. 26. And when was it that you let him go to the Water-Works Company at Omaha for the purpose of entering the employment of that company?

A. My impression is it was in the summer of 1903. He was working with my son in New York city at that time. I should say it was the summer of 1905.

X Q. 27. Then Mr. Phillips remained with the Water Works Company in Omaha from that date up until the period in 1904 when you were in Omaha and saw these blue prints, schedules, etc.

A. No, at the time he showed those to me he was again in our employ. He had finished that work and returned to Omaha. I don't know as I have got my dates right.

64 X Q. 28. Why did Mr. Phillips return to Omaha at the time you were there at the date you have stated if he had finished his work in Omaha?

A. I am a little doubtful as to that.

Mr. HALL: Just to call it to your attention, Mr. Cole, don't you remember Mr. Phillips did also make an affidavit in this case?

A. Yes, he did.

Mr. HALL: And it was for that purpose?

A. Yes, I presume it was for that purpose: That is true.

Mr. HALL: And to call it to your attention, that time you were there was at or about the time those affidavits were filed?

A. Yes, that is true.

Mr. HALL: That would be 1905.

A. 1905, that is right.

Mr. WEBSTER:

X Q. 29. Then, Mr. Cole, you had no personal knowledge of the accuracy of any of those blue prints or schedules or documents you saw?

A. None at all.

X Q. 30. And Mr. Phillips was not in the employment of the Water Works Company nor in the City of Omaha at the time of the construction of the water works plant in that city?

A. No.

X Q. 31. And then would have no personal knowledge of any of that construction work except that which could be seen from an out-word inspection?

A. Certainly.

X Q. 32. And would have no personal knowledge of the underground work?

A. No other than what you have mentioned, by inspection.

Mr. WEBSTER: I believe that is all we care to ask.

Redirect examination.

By Mr. HALL:

R. D. Q. 1. Mr. Cole, what relation do you sustain to Mr. Alvord?

A. He is my brother-in-law.

R. D. Q. 2. You were asked as to his capacity in his specialties. Isn't it true that Mr. Alvord is more of a sanitary engineer than he is anything else?

A. I think that is his advertised specialty. He uses that.

R. D. Q. 3. Do you consider that he ranks equally with Mr. Mead and Mr. Benzenberg as a water works engineer?

A. Well, that is the question I was trying to get away from before.

R. D. Q. 4. I understand, Mr. Cole, but as the gentlemen on the other side have made you their witness for that purpose I
65 am obliged to ask you what is your opinion in respect to that?

Mr. WRIGHT: We object to this as incompetent and not redirect examination.

A. I do not think, from what I know of his experience, that he has had the experience in water works that either Mr. Benzenberger or Mr. Mead have had.

Mr. HALL:

R. D. Q. 5. Mr. Cole, what have you to say as to the ability and integrity of Mr. Phillips? Would he do his work honestly and accurately?

Mr. WEBSTER: To which question the defendant objects, as irrelevant and immaterial. No charge of incompetency or lack of integrity has been made against Mr. Phillips, and it has no relevancy or bearing upon any question at issue in this case.

Mr. HALL: That is true; no charge has been made, but like all

the course on the other side, it has been insinuated. There is no charge made. It is simply insinuated. I want to meet that insinuation.

Mr. WRIGHT: There has been no insinuation made against his integrity of any kind, nor ability, and we resent it at the very first intimation.

(Last question read.)

A. He has been in our employ ever since he left, nearly, until recently, and we would not have had him if we had had any doubts on either point.

Signature waived by agreement of counsel. The further taking of depositions herein was adjourned until 2:30 o'clock P. M. this day.

TUESDAY, *February 12, 1907*—2:30 P. M.

The taking of depositions herein was resumed as follows:

ISHAM RANDOLPH, of lawful age, being first, duly sworn as a witness on behalf of the complainant, deposes and says:

Direct examination.

By Mr. HALL:

Q. 1. Mr. Randolph, what position do you occupy at present?

66 A. I am chief engineer of the Sanitary District of Chicago.

Q. 2. How long have you occupied that position?

A. Since the 7th of June, 1893.

Q. 3. What is your profession?

A. Civil engineer.

Q. 4. What positions have you occupied in the practice of your profession?

A. All the positions from axeman up to chief engineer.

Q. 5. How long have you been engaged in the practice of your profession?

A. 39 years this coming October.

Q. 6. You may state, if you will, please, the various positions you have occupied during the course of that practice?

A. Axeman, B. & O.; rodman, B. & O.; leveler, Washington & Ohio Railroad; transit man, Lehigh Valley Road; engineer in charge of location, Baltimore & Ohio; engineer in charge of construction, Baltimore & Ohio; assistant engineer, Sciota Valley Railroad; engineer and rodman, Sciota Valley Railroad; chief engineer of the Chicago & Western Indiana Railroad and the Belt Railway of Chicago; chief engineer of the Chicago, Madison & Northern; consulting engineer of the Baltimore & Ohio Railroad; consulting engineer of the Union Stock Yards Company; consulting engineer for the Chicago Terminal Transfer Company. Its name at that time was the Chicago & Calumet Terminal. Consulting engineer for two of the water power companies at Niagara; member of the Board of Consulting Engineers for the Panama Canal. I guess that is all.

Q. 7. When were you appointed as one of the members of the Board of Engineers on the Panama Canal?

A. I was appointed in July or August, 1905.

Q. 8. Are you acquainted, Mr. Randolph, with Mr. D. W. Mead?

A. I am.

Q. 9. Do you know his reputation among engineers, and his standing in that profession?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, and having no bearing or relation to any issues in this case, and not tending to support the plaintiff's petition.

A. Yes, I do.

Mr. HALL:

Q. 10. You may state what his reputation and standing is in that respect?

Mr. WRIGHT: Same objection.

A. His reputation is that of a careful and reliable engineer, and his standing in the profession is excellent.

67 Mr. HALL:

Q. 11. Mr. Randolph, assume an appraisalment to be in progress of a water works plant, and the course pursued by the water company in laying its inventory of property before the appraisers is to prepare a series of maps and blue prints showing its property and delineating it so that it can be traced on the maps, what would you say as to that being a proper or improper way of laying its facts before the Board of Appraisers?

Mr. WRIGHT: That is objected to as immaterial and incompetent and irrelevant under any issues made in this case because the question is hypothetical and not based upon any actual fact nor sufficiently definite to enable the witness to testify understandingly.

A. Granting that the maps are made from reliable data, and truthfully present the facts, they afford a means of saving the appraisers a great deal of individual research, and present the matter fairly to their consideration.

Mr. WRIGHT: I move to strike out the answer as not responsive:

Mr. HALL:

Q. 12. Do you know Mr. George H. Benzenberg?

A. I do.

Q. 13. How long have you known him?

A. For probably fifteen or more years?

X. 14. Do you know his reputation and standing as an engineer?

A. I do.

Q. 15. You may state what it is?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, and having no bearing or relation to any issues in this case, and not tending to support the plaintiff's petition.

A. Mr. Benzenberg's reputation is that of a man of ability and experience in his profession.

Mr. HALL:

Q. 16. What would you say would be the credit to be attached to estimates made by Mr. Mead and Mr. Benzenberg in their profession?

Mr. WRIGHT: Objected to as incompetent, irrelevant and immaterial to any issues in this case.

A. I should be prepared to accept them as being reliable, trustworthy.

Mr. HALL: You may take the witness, Mr. Wright.

68 Cross-examination.

By Mr. WRIGHT:

X Q. 1. You would not want to say, would you, Mr. Randolph, that the maps presented in this case of the appraisement were proper maps?

A. Sir?

X Q. 2. You would not want to say that the maps presented in this case were proper maps in this case?

Mr. HALL: That is objected to because the witness has not been inquired of in respect to these maps or any particular maps, but in reference to the course pursued, whether the same would be a proper course.

A. I would not want to say that any maps or plans that I had never seen were proper maps or plans.

Mr. WRIGHT:

X Q. 3. And if these maps and plans were prepared simply from hearsay and by someone who could not see or know the properties, you would not think that was a proper sort of maps and plans would you?

A. Well, I want to say right here that the great majority of maps are prepared from data which is procured by others. The draftsman very seldom makes the surveys from which the maps are made.

X Q. 4. Yes, but matters and maps which are drawn from no original construction, but simply from reports that he gets and gathers from other persons would not be the reliable data that you would base it upon, would it?

Mr. HALL: That is objected to, because there is no state of facts to which that question applies.

A. That would depend upon the reliability of the sources from which he got his information entirely.

Mr. WRIGHT:

X Q. 5. In estimating and entering upon an appraisement of a water plant, if you should find in that some 500 maps with drawings and details as to each particular crossing of the pipes under street car tracks and other railways, a separate drawing for each one of those made up with no knowledge by the draftsman or anybody

as to just how they were constructed, would you think that was necessary?

A. If they were made up by a draftsman "or anybody", I should think it was a fictitious map.

X Q. 6. Did you ever sit on appraisements with Mr. Mead or Mr. Benzenberg?

A. I never did.

X Q. 7. You are not an expert in hydraulic water works engineering?

A. Not water engineering, no sir.

X Q. 8. A civil engineer with railroads?

69 A. Yes. Not with the pumping end of it.

X Q. 9. Not with the water works?

A. The city supply end of it.

X Q. 10. And all you know of Mr. Mead is, his general reputation as an engineer is good?

A. Yes sir.

X Q. 11. And the same with Mr. Benzenberg?

A. Well, Benzenberg I actually served with. He has worked with me on certain developments.

X Q. 12. Not on city water works or anything of that kind?

A. Well, it was in connection not with the water supply of a city, but with disposing of its sewerage.

X Q. 13. All you say about him is, his general reputation as an engineer is good?

A. And that my association with him at that time satisfied me that his general reputation was deserved.

X Q. 14. Now, as to saying the weight you would give to an appraisalment you would give the same weight to an appraisalment of any reputable engineer?

A. Yes sir, any reputable engineer.

X Q. 15. And that would be controlled by knowledge, or influenced by knowledge of the facts of what had been done by the engineers in making up the appraisalment, wouldn't it?

A. Yes sir, I should be willing to abide by their judgment, unless I was called upon to make a study which convinced me that they were wrong.

X Q. 16. And it would be upon the assumption that they had proceeded upon the right theory in arriving at the valuation?

A. Yes sir.

X Q. 17. And that they had not been guilty of improper conduct in the course of it?

A. Certainly.

Mr. WRIGHT: That is all.

Redirect examination.

By Mr. HALL:

R. D. Q. 1. You were asked this question in cross examination, Mr. Randolph; as to whether you would give the same credit to any other competent engineer as you would to Mr. Benzenberg or Mr. Mead. I will ask you whether you do not in your own mind make

distinction in the character and standing of engineers even though competent?

A. I would make only that distinction where I had some means of knowing the characteristics of the man. As a general proposition any engineer of good standing, of good reputation, unless I knew personally something of his characteristics, I would accept his statements and results of his work as being reliable.

70 R. D. Q. 2. Suppose, for illustration, you had an engineer who pursued one class of work as a specialty, that specialty not being water works engineering. Would you regard his opinion or views as having the same degree of weight as the opinions of engineers who made a specialty of hydraulic and water works engineering?

A. That would depend upon the previous education of the man and the length of time which he had been able to devote to this subject.

R. D. Q. 3. I am giving you that in my hypothetical case. Suppose a man had made a specialty of other branches, as compared with an engineer who had made a specialty of hydraulic and water works engineering, assuming them to be men of equal-y good repute so far as their character was concerned?

A. May I bring out the distinction in my thought here?

R. D. Q. 4. I would like to have you do so.

A. That man may in his collegiate course have taken up hydraulics to an extent which had he followed that branch would have made him an expert in that line. Then in after years he did not follow it, but he had that knowledge. If he was able to devote time enough to the subject, to develop the knowledge which he had, I would attach a great deal of importance to his conclusions.

R. D. Q. 5. As I understand, you are aware of the fact that both Benzenberg and Mead have to a great extent made a specialty of water works and hydraulics?

A. Yes sir, I know that to be a fact.

R. D. Q. 6. Referring then to that, how would you compare their views in giving weight to their conclusions, with one who had not made a specialty, when their views were addressed to the particular subject which they had made a specialty of.

A. I should give more weight to their views.

Mr. HALL: That is all.

Recross-examination.

By Mr. WRIGHT:

R. X Q. 1. You would think three years devoted to one appraisalment would be sufficient time to make an investigation, wouldn't you?

A. I should think it would pretty nearly make an expert of a man.

R. X Q. 2. You never heard of an appraisalment of a water works before taking three years, did you?

A. No, I never did.

Mr. HALL: You never heard of any taking three years, did you?

71 A. No sir.

Mr. HALL:

Q. So far as any water works appraisement taking three years is concerned, the only thing you know about it is the question asked by counsel?

A. That is all I know.

Signature waived by agreement of counsel.

WILLIAM S. MACHARG, of lawful age, being first duly sworn as a witness on behalf of the complainant, deposes and says:

Direct examination.

By Mr. HALL:

Q. 1. You may state your name, age and place of residence, Mr. MacHarg?

A. William S. MacHarg; Chicago; my age is 59.

Q. 2. What is your present position, Mr. MacHarg?

A. I am consulting engineer to the city of Chicago on intercepting sewers, and at present engaged on water works improvements.

Q. 3. What is your profession?

A. Civil engineer.

Q. 4. What school are you a graduate of?

A. Michigan University.

Q. 5. You may state, if you please, the various water works construction that you have been engaged in, and any connection you have had with water works plants?

A. My earliest work was in the office of Mr. E. S. Chesebrough, private office. He was at that time the City engineer of Chicago on water works and sewage plans. Afterwards in New Haven as assistant engineer on sewage construction. The work that I have been in has been both sewage and water works, running along through the years. Shall I give the whole of it?

Q. 6. Yes.

A. Then as engineer with the City of Chicago in sewage construction, and in some part of the water works system, notably tests of engines. After that I was in commercial construction work in sewage and plumbing of large structures. Then I was the engineer of water supply, sewage and fire protection of the World's Columbian Exposition. After that again in general practice on design of water works and sewage and sewage disposal plants, and since 1897 I have been with the City in this present position.

Q. 7. Have you been connected with any appraisals of water plants?

A. Yes sir.

Q. 8. You may state what appraisals you have been connected with?

A. Appraisal of Dubuque water works, Cedar Rapids, Iowa; Lake Forest, Illinois, and LaGrange, Illinois.

72 Q. 9. In what way were you connected with those appraisements?

A. In the case of Dubuque I represented the city. I was a wit-

ness for the city, one of four that the city offered. In Cedar Rapids I represented the city, one of four, I believe, there. In Lake Forest I was one of the appraisal board, representing the city on that board. In LaGrange I was the sole appraiser.

Q. 10. From your experience, Mr. MacHarg, as an engineer, and your knowledge of water works appraisements, you may state whether, in your opinion, it would be a proper or improper way for a water company on an appraisement to prepare maps and plans of its plant and detail drawings of its system to present to the appraisers for the purpose of showing its property as claimed by it to the appraisers?

Mr. WRIGHT: That is objected to as immaterial, incompetent and irrelevant to any issue in this case, and not a proper method of attempting to sustain the appraisement.

A. It is a proper method to show the water system, distribution system.

Mr. HALL:

Q. 11. What would you say as to its being a proper method as to any other items of construction?

A. I have never known its use to show anything except the distribution system. In addition the list of other properties was submitted.

Q. 12. When you speak of your list of other properties, you speak of articles that exist and which can be scheduled up in amount?

A. Yes sir.

Q. 13. But I am speaking now of construction of various buildings, of underground construction, for instance, and the like of that.

A. It is a method, it is one method used to show the underground system.

Q. 14. When you speak of the distribution system then you mean to include the underground?

A. That is the underground. The water mains, valves and hydrants.

Q. 15. And how about foundations and basements?

A. They are commonly described or examined by the appraisers as in the case of building foundations.

Q. 16. Would it be a proper method in order to illustrate the water works company's claims to show by plans what they claimed the construction was?

A. It is a proper method to show it, yes, sir.

Q. 17. It rests with the appraisers to accept that or not, as they please?

73 Mr. WRIGHT: I object to that as calling for the conclusion of the witness.

Mr. HALL: Perhaps that is so.

Q. 18. When you speak of schedules and articles to be placed in schedules, you mean property above ground which can be seen and piled in heaps, such as pipe above ground and articles of property of the like character?

A. The engines, buildings and artesian wells; any properties of the water company, including office, list of pipes, valves and hydrants—the quantities are set forth in a schedule.

Q. 19. The general rule as to the use of maps and plans is in regard to construction which is more or less concealed?

A. In my experience the only place in which a map of the underground system, distribution system, was shown, was at Lake Forest?

Q. 20. Have you ever had an appraisal where rip-rap was to be included which went down to bed rock in a river?

A. That is, rip-rap placed as a protection to banks?

Q. 21. Yes.

A. I don't recall whether there was any at Dubuque or not. I don't recollect that there was.

Q. 22. Had you any settling basins at Lake Forest?

A. No sir.

Q. 23. Do you know D. W. Mead?

A. Yes sir.

Q. 24. Do you know his reputation as an engineer in his profession?

A. I do know it.

Q. 25. You may state what his character and standing is — an engineer in his profession?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, and having no relation or bearing to any issues in this case, and not tending to support the plaintiff's petition.

A. It is that of a careful, painstaking able engineer.

Mr. HALL:

Q. 26. Do you know George H. Benzenberg?

A. Yes sir.

Q. 27. Do you know his character as an engineer in his profession?

A. Yes sir.

Q. 28. You may state what it is?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, and having no bearing or relation to any issues in this case, and not tending to support the plaintiff's petition.

74 A. His reputation is that of an engineer of ability and experience. He stands high in his profession.

Mr. HALL:

Q. 29. Do you know whether or not they make a specialty of hydraulic and water works engineering?

A. Yes sir, I know that they do.

Q. 30. What weight would you say was to be attached to estimates made by them in reference to their specialties?

Mr. WRIGHT: Objected to as incompetent, irrelevant and immaterial, and because it is no proper way to prove any of the issues in this case.

A. I should say that they would be given the weight of careful,

painstaking estimates upon which they would place values in accordance with their best judgment.

Mr. HALL: You can take the witness.

Cross-examination.

By Mr. WRIGHT:

X Q. 1. You would place that same weight on any reputable engineer of experience in that work unless you knew of some personal matters connected with him?

A. Well, with this difference; that I know these two individuals, and might not know that other except by reputation.

X Q. 2. Of course, you know nothing about the conduct of the appraisers in this particular appraisalment?

A. No sir, except by hearsay.

X Q. 3. What you have been informed by the counsel, and general hearsay about it?

A. No, I have heard of the case before.

X Q. 4. Do you know Mr. J. W. Alvord?

A. Yes sir.

X Q. 5. He is a reputable engineer of experience in hydraulics and water works?

Mr. HALL: That is objected to as not proper cross-examination. I will make that same objection to all this line of examination.

A. Yes, sir.

X Q. 6. And you know him to be a man of integrity and ability in his line?

A. Yes sir.

X Q. 7. There is no necessity, in your experience, of any great number of drawings of these matters which are above ground and can be seen by engineers in a matter of an appraisalment, is there?

A. Why, it is not common in my experience.

75 X Q. 8. Would you say that it was necessary or proper to take time to prepare a detailed drawing of each of the crossings of the pipes under each street car and railroad line to the amount of four or five hundred in an appraisalment?

A. I never have known it done.

X Q. 9. You would not see any use of it either, would you?

A. No sir.

Mr. WRIGHT: That is all.

Redirect examination.

By Mr. HALL:

R. D. Q. 1. Mr. MacHarg, does it make any difference in the estimate or value of a pipe crossing whether it is laid under pavement or not?

A. Oh, yes.

R. D. Q. 2. Do you think it would be improper to show in your plan the pavement and the various conduits that crossed that pipe, above or below it, interfering with construction?

A. Nothing improper in showing that.

R. D. Q. 3. Don't you think it would be a good thing to do in order to show just how that crossing was made?

A. Well, it would require evidence, of course, that all this work was in when these pipes were laid.

R. D. Q. 4. I understand that, but admitting it to be supported by evidence, and to be true and correct, wouldn't it be a valuable thing to show in order to fully delineate it?

A. All information as to impediments in the way of laying mains is valuable and necessary in forming the idea of the cost of that work and value of that work.

R. D. Q. 5. Assuming that plans were made of the buildings above ground, would you regard that as calculated to deceive a board of appraisers very much?

Mr. WRIGHT: Objected to as incompetent and immaterial and calling for a conclusion.

Mr. HALL: Well, I will withdraw that question. That is all.

Signature waived by agreement of counsel.

L. W. RUNDLETT, of lawful age, being first duly sworn as a witness on behalf of the complainant, deposes and says:

Direct examination.

By Mr. HALL:

Q. 1. Mr. Rundlett, you may state your name and age?

A. L. W. Rundlett; age, 60 years.

Q. 2. What is your profession?

A. Civil engineer, more particularly in regard to municipal engineering.

Q. 3. What position are you occupying at present?

76 A. I am occupying the position of Commissioner of Public Works in the City of St. Paul, which includes the office of City Engineer and Building Inspector, and in charge of maintenance of streets, sewers and bridges.

Q. 4. What connection have you had with water works plants in the course of your profession?

A. I built the water works plant in St. Paul. That has been the great work that I have been on.

Q. 5. Have you ever had any connection with water works appraisements?

A. Well, I have in two instances. One instance at Fergus Falls some years ago, and another at Stillwater.

Q. 6. Do you know Mr. D. W. Mead?

A. I think I met Mr. Mead, but I know him more by reputation than I do from any intimate acquaintance.

Q. 7. What is his reputation in his profession?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, and the witness has not shown himself competent to answer.

A. He stands high. I know that he is acting as consulting engi-

neer, and I understand at the present time he is one of the professors at Madison, and he stands high in his profession, stands well.

Mr. HALL:

Q. 8. Do you know George H. Benzenberg?

A. I know George H. Benzenberg very well, indeed. Our acquaintance commenced away back in the '70's, when he was assistant engineer in Milwaukee, and I was assistant engineer in St. Paul: He became engineer of Milwaukee about the same time I did of St. Paul, and we have been thrown together a great deal in discussing municipal affairs of both cities. I have been there very often and he has been in St. Paul. We worked on committees together in municipal organizations, and otherwise we have had a social connection, so that I consider I know Mr. Benzenberg thoroughly.

Q. 9. Do you know what is his standing and reputation in his profession?

A. Yes.

Q. 10. You may state what is his standing and reputation in his profession?

Mr. WRIGHT: Objected to as incompetent, irrelevant and immaterial and not proper proof of any issues in this case.

A. I regard him as standing in the front ranks of municipal engineers.

Mr. HALL:

77 Q. 11. Do you know whether he makes a specialty of hydraulics and water works engineering?

A. Yes, he has been more particularly since he left the position of City Engineer of Milwaukee, I know he has been connected almost continuously with hydraulic work, and before that I know well the work he did in Milwaukee in the tunnels and in the sewer that he built to reinforce, or, rather to send water from the lake into the river. I have been all over those works with him.

Q. 12. You may state, Mr. Rundlett, what weight you would attach to estimates made in the exercise of their profession by Mr. Mead and Mr. Benzenberg?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, and not proving any of the issues in this case, and calling for the conclusion of the witness, and attempting to substitute the opinion of the witness in matters which are peculiarly for the determination of the court.

A. As far as Mr. Benzenberg is concerned I should place the greatest weight on his judgment and on his estimates. In fact I don't think of anyone that I would give more weight to. Mr. Mead, as I say, I know him simply by reputation, and I believe him to be a conscientious engineer from everything that I know of him, reliable and conscientious. Otherwise I can say nothing of my personal knowledge of his characteristics.

Mr. HALL:

Q. 13. Mr. Rundlett, assuming that an appraisalment was being

made of the property of a water company, and that the water company should prepare plans and blue prints of all its property, showing the construction of the property, and should lay the same before the appraisers for the purpose of showing the property which is claimed, what would you say as to such a method being proper or improper?

Mr. WRIGHT: That is objected to as immaterial, incompetent and irrelevant to any issue in this case, and not a proper method of attempting to sustain the appraisal. This same objection is to apply to all this class of testimony.

A. It would be certainly proper.

Mr. HALL: Take the witness

Cross-examination.

By Mr. WRIGHT:

78 X Q. 1. It would depend upon whether those blue prints were made from actual knowledge, by someone having actual knowledge, or from actual evidence, wouldn't it?

A. Whatever was laid before the appraisers would be—I mean the more in detail that it is laid before the appraisers the quicker and easier they would be able to judge. Of course both sides are represented in this appraisal. It would be the duty of the other side to see that they were correct.

X Q. 2. You are not answering my question. Then if they should go and put in an appraisalment there without letting the other side see it, you would not think that was proper, would you?

A. Without letting them know anything about it?

X Q. 3. Yes.

A. I could not say it was not proper if they posted their man, but the other man ought to be able to obtain that knowledge.

X Q. 4. If they should put in the plans and specifications or matters which they would not let the other side see or know what is contained, you wouldn't think that was proper, would you?

Mr. HALL: I object to that unless the counsel details facts, and not a theory which does not apply to the case.

A. Well, you mean to give to their particular engineer, and not let the other see it?

Mr. WRIGHT:

X Q. 5. Not given to the whole of them?

A. If it is given to the whole of them——

X Q. 6. Without letting the representative of the other side know it or see it.

A. If it is given to them so they could see it, I think it is proper.

X Q. 7. Supposing the attorneys should appear for the other side and the representatives of the other side are refused a chance to see the plans, and the matters which they present, would you think that was proper?

Mr. HALL: That is objected to as no plans were ever offered to

the Board of Appraisers in the manner indicated by counsel, and if counsel refers to the books he should make his statement frankly and honestly, to the witness, and not endeavor to deceive him.

A. I don't see exactly how an estimate could be made up, without their having an estimate in regard to the physical facts, which is generally an easy proposition.

79 Mr. WRIGHT:

X Q. 8. Supposing maps and plans were put in there that they would not allow the other side to see, would you think that was a fair deal?

A. I think if I was on the other side I would see them, or I would find out about them.

X Q. 9. Well, if they wouldn't let you, what would you think then?

A. I don't understand such a condition to exist.

X Q. 10. I say supposing that was done, would you say that was a fair and proper way?

A. It would be perfectly fair, of course, to post their own engineer representing their side, for instance, in regard to every detail, but if they wanted a fair appraisalment, I should suppose that all those details would help.

X Q. 11. They would have to be submitted to the other side so they could make such showing as they desired, wouldn't they?

A. I should suppose the other side would find that out. I don't know as it was absolutely necessary for them to see them. If it was made up in the City of St. Paul I would give them.

X Q. 12. Exactly, and you would let the other side see everything, wouldn't you?

A. I wouldn't have any objection to it.

X Q. 13. Supposing details of plans of their works should be presented which they would not let the other side see. You would not think that was proper, would you, to present them in that manner?

Mr. HALL: What do you mean? Presented to the appraisers?

Mr. WRIGHT: Presented to the appraisers, yes.

A. Where all the appraisers had the chance to see them?

X Q. 14. Yes.

A. Certainly, that would be perfectly proper.

X Q. 15. Then you think it would be perfectly proper for a water company that had a board of appraisers to put its plans in there and let the appraisers see them and not let the other side see them, would you?

Mr. HALL: We object to that as not proper cross-examination, and further, we notify counsel that he makes the witness his own witness.

A. Certainly, the appraisers are the one to decide, and they are shown all the evidence.

80 Mr. WRIGHT:

X Q. 16. And you don't think it makes any difference whether it is shown to the other side or not?

A. Not a particle.

X Q. 17. That is your understanding of the propriety of introducing evidence, is it?

A. I would like to explain my position a little bit.

X Q. 18. Answer my question first.

A. Yes.

X Q. 19. Now explain.

A. My idea is when you have got representatives and appraisers, as long as they have the facts that is what you are to stand on, most decidedly.

X Q. 20. Your idea of the propriety of this proceeding, you look at the appraiser selected by each side as the representative?

A. As the representative, yes sir, I do, because if I put the matter for the city into their hands they are its representatives. If he fails, that is rather bad.

X Q. 21. That is your idea of an appraisal?

A. Yes sir, that is my idea. My idea is that when both sides agree to put it into the hands of the appraisers, that it should be left absolutely in the hands of the appraisers to make the decision.

X Q. 22. And the man chosen by the Water Company is the representative of the Water Company on that Board?

A. Certainly.

X Q. 23. And the one chosen by the City is the representative of the City?

A. Yes, and the third man is the absolutely impartial judge between the two.

X Q. 24. That is, when a third man is chosen as an umpire?

A. Yes, sir.

X Q. 25. And it would depend upon that, because if he was not chosen as an umpire, your theory of it you would not stand to, would you?

A. As I understand, every appraisal I have been on, that has been the condition.

X Q. 26. Yes, but you don't know anything about this appraisal, do you?

A. I am giving you my theories of an appraisal.

X Q. 27. And your theory is based upon the fact that the third man is chosen as an umpire?

A. To arbitrate between, any differences.

X Q. 28. If two men cannot agree, he has to settle the differences?

A. Yes sir.

81 X Q. 29. And that is the theory upon which you have gone in making your statements that you have made to the reporter?

A. About having the evidence submitted to the appraisers, and that they are to settle it.

Mr. WRIGHT: That is all.

Signature waived by agreement of counsel.

STATE OF ILLINOIS,
County of Cook, ss:

I hereby certify that on the 12th day of February A. D. 1907, before me, Geo. C. Holmes, a Notary Public in and for the County of Cook and State of Illinois, at Room G. 1, Auditorium Annex in the City of Chicago, County of Cook, State of Illinois, personally appeared between the hours of 8 o'clock A. M., and 6 o'clock P. M., John A. Cole, Isham Randolph, William S. MacHarg and L. W. Rundlett, witnesses, and Mr. R. S. Hall, and Mr. Herbert C. Lakin appeared as counsel for complainant, and Mr. John L. Webster and Mr. C. C. Wright appeared as counsel for defendant, and the said witnesses being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the depositions hereto annexed.

And I further certify that the said depositions were then and there reduced to writing by me, and that the signatures of the witnesses to their said depositions were waived by agreement of counsel.

And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause.

And I further certify that the fee for taking said depositions, \$——, has been paid to me by the complainant, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and seal at the City of Chicago, in the County of Cook and State of Illinois, this 12th day of February, A. D. 1907.

[SEAL.]

GEO. C. HOLMES,
Notary Public, Cook County, Illinois.

Endorsed: Filed Mar. 6, 1907. Geo. H. Thummel, Clerk.

Thereupon, afterwards, to-wit: At the November 1906 term of said Court, and on the 26th day of March, 1907, the following proceedings were had and done in said case, as appear of record in Journal No. "6" of said Court, to-wit:

OMAHA WATER COMPANY
vs.
CITY OF OMAHA.

It is ordered that this cause be and the same hereby is peremptorily set for trial May 13th, at 9:30 o'clock.

Thereupon, afterwards, to wit: On the 5th day of April, 1907, Affidavit of R. S. Hall was filed in said case, which said Affidavit is in words and figures following, to-wit:

In the United States Circuit Court for the District of Nebraska.

OMAHA WATER COMPANY, Plaintiff,

vs.

CITY OF OMAHA, Defendant.

Affidavit of R. S. Hall.

STATE OF NEBRASKA,

Douglas County, ss:

R. S. Hall, being duly sworn, deposes and says that Howard Mansfield, of New York is counsel with him engaged in the hearing of the above cause; that the testimony in this case has not yet all been extended and that affiant has not been able to forward a copy of the same to Mr. Mansfield; that affiant has received a telegram from Mr. Mansfield in which he informs affiant that his engagements in the east are such that it will be absolutely impossible for him to be in Omaha to attend the hearing, before the 8th day of April. Affiant further says Mr. Mansfield's presence is necessary in the course of said hearing and that he should have time to obtain the testimony and read it and make proper preparation for the hearing before he is called upon to enter upon the trial. Affiant therefore suggests to the Court that the case should not be set down peremptorily for hearing there being no call of the docket at this time, at such date as would prevent Mr. Mansfield from being present and arguing the case, together with time for him to make preparation and examination of the testimony.

And further, affiant sayeth not.

R. S. HALL.

83 Subscribed in my presence and sworn to before me this
25th day of March, 1907.

[SEAL.]

EDITH OLSEN,
Notary Public.

Endorsed: Filed Apr. 5, 1907. Geo. H. Thummel, Clerk.

Thereupon, afterwards, to-wit: On the 13th day of May, 1907. Testimony taken on behalf of the Complainant was filed in said case, which said Testimony is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of
Nebraska.

No. 74. Doc. "X".

OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

Testimony taken on behalf of the complainant, Omaha Water Company, under the 67th rule of the Supreme Court, as amended

pursuant to agreement of parties, before Charles W. Pearsall, Examined in Chancery in said Court, at Room No. 429, Omaha National Bank Building, in the City of Omaha, County of Douglas, in the State of Nebraska, beginning at the hour of ten o'clock A. M., January 12, 1907.

Present: R. S. Hall, Esq., Solicitor for Complainant; Carl C. Wright, Esq., Solicitor for Defendant.

It is hereby stipulated and agreed that the testimony may be taken in shortland by Charles W. Pearsall, the Examiner before whom the testimony is being taken, and by him extended into longhand.

It is further agreed that the signature of the witnesses to each of their respective depositions are waived.

Mr. HALL: I will now offer in evidence the testimony of Alonzo B. Hunt, together with the exhibits offered and referred to at the time such testimony was given, taken between the same parties in the case wherein the Water Board of the City of Omaha and the City of Omaha were complainants, and Daniel W. Mead, John W. Alvord and George H. Benzenberg and the Omaha Water Company, a corporation, were defendants, being Docket "W" No. 209, in the United States Circuit Court for the District of Nebraska, as said testimony appears on pages 5 to 83 both inclusive, of the transcript of the testimony taken in said case.

Mr. WRIGHT: To which the defendant objects as immaterial and incompetent, but makes no objection for and on account
84 of the reason that it is the testimony taken in the case referred to, and we admit that the same may have the same effect as though taken in this case.

Mr. HALL: I will also offer in evidence the testimony of Edmund M. Fairfield, taken in the same case, Docket "W" No. 209 together with the exhibits offered upon the examination of said witness, as said testimony appears on pages 84 to 95 both inclusive and pages 265 to 275 both inclusive of the transcript of the testimony taken in said case.

Mr. WRIGHT: To which the defendant objects as immaterial and incompetent, but makes no objection for and on account of the reason that it is the testimony taken in the case referred to, and we admit that the same may have the same effect as though taken in this case.

Mr. HALL: I will also offer in evidence the testimony of W. A. Underwood, as the same is found in the record thereof on pages 27 to 59 inclusive, and pages 243 to 248 inclusive, of Volume 2, of the testimony taken in the hearing on the appraisalment, in the matter of the appraisalment of the property of the Omaha Water Company, before the Board of Appraisers; said testimony also appearing on pages 98 to 136 inclusive, of the testimony taken before Charles W. Pearsall, Examiner in Chancery in the case of the Water Board of the City of Omaha, and the City of Omaha, vs. Daniel W. Mead, et al., being Docket "W", No. 209, in the Circuit Court of the United States for the District of Nebraska.

Mr. WRIGHT: To which we object as being incompetent and immaterial and because the testimony taken before said Board of

Appraisers was not taken before an officer competent to administer an oath, and is not the sworn testimony taken in any case pending in any court between the parties to this litigation.

Mr. HALL: I will also offer in evidence the testimony of Captain Frank Reynolds, as the same is found in the record thereof on pages — to — inclusive, in Volume 2 of said record, of the testimony taken in the hearing on the appraisement, in the matter of the appraisement of the property of the Omaha Water Company, before the Board of Appraisers; said testimony also appearing on pages 139 to 202 inclusive, of the testimony taken before Charles W. Pearsall, Examiner in Chancery, in the case of the Water Board of the City of Omaha, and the City of Omaha vs. Daniel W. Mead, et al., being Docket "W", No. 209, in the Circuit Court of the United States for the District of Nebraska.

Mr. WRIGHT: To which we object as being incompetent and immaterial, and because the testimony taken before said
85 Board of Appraisers was not taken before an officer competent to administer an oath, and is not the sworn testimony taken in any case pending in any Court between the parties to this litigation.

Mr. HALL: I will also offer in evidence the testimony of Wilbur F. Hawes, taken in the same case, Docket "W", No. 209, together with the exhibits offered upon the examination of said witness, as said testimony appears on pages 204 to 224, both inclusive, of the transcript of the testimony taken in said case.

Mr. WRIGHT: To which the defendant objects as immaterial and incompetent, but makes no objection for and on account of the reason that it is the testimony taken in the case referred to, and we admit that the same may have the same effect as though taken in this case.

Mr. HALL: I will also offer in evidence the testimony of F. H. Marshall, taken in the same case, Docket "W", No. 209, together with the exhibits offered upon the examination of said witness, as said testimony appears on pages 225 to 232 both inclusive, of the transcript of the testimony taken in said case.

Mr. WRIGHT: To which the defendant objects as immaterial and incompetent, but makes no objection for and on account of the reason that it is the testimony taken in the case referred to, and we admit that the same may have the same effect as though taken in this case.

Mr. HALL: I will also offer in evidence the testimony of Captain Edward Ruger, taken in the same case, docket "W" No. 209, together with the Exhibits offered upon the examination of said witness, as said testimony appears on pages 233 to 261, both inclusive, of the transcript of the testimony taken in said case.

Mr. WRIGHT: To which the defendant objects as immaterial, and incompetent, but makes no objection for and on account of the reason that it is the testimony taken in the case referred to, and we admit that the same may have the same effect as though taken in this case.

Mr. HALL: I will also offer in evidence the amended and supplemental petition in the case of the City of Omaha, vs. The Farmers'

Loan and Trust Sompany, et al., being docket "S", No. 24, the same being known, marked and referred to as Exhibit 1, in the transcript of the testimony, taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, as the same is shown at page 276 of said transcript.

86 Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues, in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will also offer in evidence the answer of the Omaha Water Company, to the amended and Supplemental petition in the case of the City of Omaha vs. The Farmers' Loan and Trust Company, et al., Docket "S", No. 24, the same being known, marked and referred to as Exhibit 2, in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead et al., Docket "W" No. 209, as the same is shown at page 348 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W" No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will also offer in evidence the amended and supplemental petition, filed March 30, 1897, in the case of the City of Omaha vs. The Farmers' Loan and Trust Company Docket "S" No. 24, the same being known, marked and referred to as Exhibit 3, in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209 as shown at page 369 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the amendment to the amended bill in the case of the Water Board of the City of Omaha, vs. The Farmers' Loan and Trust Company, et al., being Docket "S" No. 24, United States Circuit Court, District of Nebraska; the same being known, marked and referred to as Exhibit 4 in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W" No. 209, as shown at page 373 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that

it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues in this case, the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the map known and marked as Exhibit 5, and so referred to in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., docket "W" No. 209.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the map known and marked as Exhibit 7, and so referred to in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the blue print known and marked as Exhibit 6, and so referred to in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection
88 as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W" No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence Ordinance No. 79, City of Florence, vacating streets and alleys, the same being marked Exhibit 8, and so referred to in the transcript, of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., docket "W" No. 209; the same being found at page 376 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact

that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence Ordinance No. 31 City of Florence, the same being marked Exhibit 9, and so referred to in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209; the same being found at page 378 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence Ordinance No. 32, City of Florence, the same being marked, known and referred to as Exhibit 10 in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209; said exhibit being found at page 383 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al.,
89 Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence "Water Works Side Track Ordinance", City of Florence, the same being marked, known and referred to as Exhibit 11 in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209; said exhibit being found at page 387 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence "Proposition of American Water Works Company" to the City of Florence, the same being marked, known and referred to as Exhibit 12 in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W" No. 209; said exhibit being found at page 389 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence "Letter of Acceptance of Above Proposition," the same being marked, known and referred to, as Exhibit 13, in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W," No. 209; said exhibit being found at page 391 of said transcript.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al.,
90 Docket "W," No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the map known and marked as Exhibit 14, and so referred to in the transcript of the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209.

Mr. WRIGHT: To which the defendant objects for the reason that it is incompetent, immaterial and irrelevant, and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the map known and marked as Exhibit 15, and so referred to in the transcript of the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W," No. 209.

Mr. WRIGHT: To which defendant objects for the reason that it is incompetent, immaterial and irrelevant and not tending to sustain any of the issues in this case; the objection as to the fact that they are introduced from the testimony in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W", No. 209, is hereby specially waived, and they may be considered the same as though originally offered and taken in this case.

Mr. HALL: I will now offer in evidence the quotation from the language of Governor Boyd, from the proceedings in the matter of the appraisal of the Omaha Water Works, the same being printed in the printed record thereof, page 29 and occurring on page 268 of the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W," No. 209.

Mr. WRIGHT: To which the defendant objects for the reason that the said quotation from Governor Boyd's statement was not the testimony taken in any case pending in Court between said parties, and is immaterial and incompetent and not binding upon the defendant.

The map referred to as Exhibit No. 5; the map referred to as Exhibit No. 7; the map referred to as Exhibit No. 15; and the blue print referred to as Exhibit No. 6, in the transcript of the testimony taken in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., Docket "W," No. 209, and offered in evidence in this case as hereinbefore set forth, are herewith presented and made a part hereof.

Cost of taking this testimony:

37½ folios at 20c.....	7.50
Certificate25
	<hr/>
	\$7.75

DISTRICT OF NEBRASKA, ss:

I, Charles W. Pearsall, Examiner, hereby certify that the foregoing proceedings in the above entitled cause were had, and the foregoing offers of testimony and exhibits made before me at the time and place in the record thereof indicated.

CHARLES W. PEARSALL, *Examiner*:

For costs see p. 15.

Endorsed: Filed May 13, 1907. Geo. H. Thummell, Clerk.

Thereupon afterwards, to-wit: On the 13th day of May, 1907, testimony of Milton T. Barlow, et al., was filed in said case, which said testimony is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

Testimony taken in behalf of the City of Omaha, defendant, before May H. Finley, Examiner in Chancery for the District of Nebraska, said testimony being taken at offices 826 in New York Life Building, in said city of Omaha, by consent of parties, the plaintiff being represented by its solicitor, Richard S. Hall, and the defendant being represented by its solicitors, John L. Webster and Carl C. Wright.

Said testimony was commenced at 10 o'clock A. M., December 26, 1906, and continued by adjournment as hereinafter noted.

MILTON T. BARLOW, a witness produced on behalf of the respondent, being first duly sworn, testified as follows:

Examined-in-chief.

By Mr. WEBSTER:

Q. State your name?

A. Milton T. Barlow.

Q. Your age?

A. Sixty-two.

92 Q. What official position do you hold with the Water Board of the City of Omaha?

A. Chairman of the Water Board.

Q. And what official relation do you sustain, if any, to the United States National Bank?

A. President.

Q. Do you know Mr. Woodbury, the president of the Omaha Water Company?

A. I do.

Q. Did any interview between Mr. Woodbury, president of the Omaha Water Company and yourself, take place in the United States National Bank in the forenoon of the 9th day of July, 1906?

A. I think it was on that date.

Q. Can you state whether or not it was on the same day that the suit was filed in the United States Circuit Court by the Omaha Water Company against the City of Omaha for the specific performance of a proposed contract of purchase and a purported report of appraisers?

A. It is my recollection that it was the same day.

Q. And can you state about the hour of the day that the interview took place?

A. In the forenoon.

Q. At the time of the said interview had you, as president of the Water Board received the purported report of the appraisers of the Water Works?

A. I had not.

Q. At the time of the said interview had you received any official information that the said appraisers had made any report?

A. No sir.

Q. You may now state in detail what the interview was between Mr. Woodbury and yourself?

A. Mr. Woodbury called upon me at the bank and presented a document purporting to be a deed from the Water Company to the City of Omaha covering, or said to cover, the property of the Omaha Water Company, and tendered that document and demanded payment of six million two hundred and some odd thousand dollars which he claimed was the award made by appraisers.

Q. What did you say to him in response to his statement and demand?

A. I declined to make the payment or accept the document.

Q. At that time had the City of Omaha or the Water Board authorized any such payment?

A. No sir.

Q. Had the City of Omaha or the Water Board at that time money on hand with which to make such payment?

A. No sir.

Q. At that time had the City of Omaha or the Water Board made any provision in any manner or form for the payment of said money?

A. No sir.

Q. Do you know, Mr. Barlow, whether or not Mr. Woodbury knew of the fact that neither the City nor the Water Board
93 had the money with which to make such payment, and had not authorized or provided for such payment?

A. My opinion is that he knew that the City of Omaha or the Water Board had made no provision for making that payment.

By Mr. HALL: I move to strike the statement of Mr. Barlow's opinion as incompetent.

Q. Did Mr. Woodbury leave with you the deed which he tendered or a copy thereof?

A. No sir.

Q. How long was it after this interview before you were advised of the fact that the Omaha Water Company had filed its suit in the United States Circuit Court to compel the City to accept said deed and to pay the said money?

A. I was advised of the fact inside of twenty-four hours.

Q. If you recollect, state whether it is not true that on the afternoon of the same day that the Water Company filed its said bill in the United States Circuit Court?

A. That is my recollection it was in the afternoon of the same day the suit was filed.

Q. At what time on that same day, if at all, did you receive the purported report of the appraisers?

A. I did not receive it the same day, I think it was received the following day.

Q. On Tuesday, then, was it?

A. I think it was on Tuesday the report was received.

Q. Upon the receiving of the said report did you officially call the attention of the Water Board to the same, and did the Water Board take action thereon?

A. Yes sir.

By Mr. WEBSTER: The defendants offer in evidence the purported report of the appraisers as received by Mr. Barlow as chairman of the Water Board, together with the proceedings of the Water Board relating thereto, as appear upon the books of the Water Board, and ask that the officer taking this testimony shall attach to the deposition copies of the said documents with her certificate thereto that same are correct, as the same appear from the records of the Water Board.

By Mr. HALL: (As copies are not offered here they are to be produced subject to such correction or objection as counsel for complainant desire to make and submit to counsel for defendant.)

Cross-examination.

By Mr. HALL:

- Q. Mr. Barlow who were present at that meeting between yourself and Mr. Woodbury?
- 94 A. I don't remember, if you said that you were with him I would believe you.
- Q. Well, don't you remember who were with him?
- A. No, I remember there were one or two others with him.
- Q. Well, don't you remember who was with him?
- A. I do not, I think you were with him, it has kind of passed out of my mind.
- Q. Wasn't I with him there?
- A. I think that you were with him.
- Q. Now what do you mean, Mr. Barlow by saying that you had no official information?
- A. I mean that I had no report from the appraisement board.
- Q. Well, you said that you had no official information, what do you mean by that, do you mean that you had no information at all?
- A. I mean that I had no official information.
- Q. Well, just answer the question, please, Mr. Barlow, do you mean by that that you had no information at all?
- A. No, I would not say that I had no information or no intimation.
- Q. You used the word "official" to disguise the fact that you really had the information, didn't you?
- A. I might say that I had information but not any official information.
- Q. Now, I will repeat the question to you; in answering that question the way you did and using the term "official" you meant to conceal the fact that you had the information, didn't you?
- A. I meant to give a correct answer to the question.
- Q. I know, but also you meant to conceal the fact that you had the information didn't you, or did you mean by that answer to reveal the fact that you had the information?
- A. I had no design in the matter either to conceal or to make known the fact that information had come to me but not in an official way.
- Q. What is your idea of official information?
- A. Official information would be the report itself.
- Q. Well, then, all you mean is in that answer that you had not the report although you had the information about it, isn't it?
- A. Yes, I had the information.
- Q. Who did you have that information from?
- A. I think it was from Mr. Wright.
- Q. Did you have it from anybody else?
- A. I think not.
- Q. Are you sure of that?
- A. That is my conclusion at this moment.
- 95 Q. Didn't you have any written information from anybody else?

A. I had no written information from anybody else.

Q. Who do you mean by Mr. Wright?

A. Mr. C. C. Wright.

Q. What did Mr. Wright tell you about the information, I mean that he had received?

A. My recollection is that the information from Mr. Wright was that the two appraisers had agreed to submit a report for an amount exceeding \$6,200,000.00.

Q. Did he show you any paper at that time?

A. I think not.

Q. Are you sure? To call your attention to it, wasn't that interview with Mr. Wright in the United States National Bank?

A. I don't remember whether it was or not.

Q. At that interview didn't he show you a paper?

A. I think not.

Q. Will you swear he did not?

A. I would swear if he did I don't remember it.

Q. Did he tell you that he had received a telegram?

A. I don't remember that he did.

Q. You have forgotten that if he did?

A. Yes.

Q. Did he tell you that he had received a message from Mr. Alvord?

A. I don't remember that he went into any details as to his information.

Q. Just the question, did he or didn't he tell you that he had received a message from Mr. Alvord?

A. I don't remember.

Q. You have forgotten that if he did?

A. Yes sir.

Q. Well, your idea was then, that he just picked this up on the street wasn't it?

A. My faith in Mr. Wright's statement was such that I had confidence in his statement as to the report that was coming down.

Q. You believed, then, what Mr. Wright told you?

A. Yes.

Q. When was it that Mr. Wright told you that?

A. I could not give you the date.

Q. Can you remember even the year, Mr. Barlow, if you should try?

A. It was on or about the date that this tender of the deed was made.

Q. Wasn't it before that day?

A. Possibly the day before.

Q. Yes, don't you know it was two days before?

A. I think that it was the day before.

96 Q. Wasn't it two days before?

A. It might possibly have been Saturday evening.

Q. Well, wasn't it?

A. I think it was the Saturday evening before that I met Mr. Wright.

Q. Now, when was it you met him?

A. I cannot tell you.

Q. You are not trying to forget about these things are you, Mr. Barlow?

A. I am not, no sir.

Q. This matter was a matter of some importance wasn't it?

A. Yes.

Q. Not so very long ago was it?

A. No, not a great while.

Q. Your memory is fairly good, isn't it?

A. Reasonably so.

Q. Now, can't you, by doing the very best you can, can't you remember something about where that meeting was?

A. I don't remember where it was that Mr. Wright and I were when he first made that statement to me, whether it was in the bank or on the street or in our room.

Q. Did you have a Board meeting that night, Saturday night?

A. I think not.

Q. Did you members of the Water Board get together informally?

A. Yes; no, not on Saturday, I think it was on Sunday the day following.

Q. When was it you got together as you remember it now?

A. As I remember it now it was on Sunday.

Q. Where was it?

A. I think it was at Mr. Wright's office.

Q. Who was there?

A. Well, I think there was at least a quorum of the Water Board.

Q. Was Mr. Wright there?

A. Mr. Wright was there.

Q. Was Mr. John L. Webster there?

A. Mr. John L. Webster was there.

Q. Now what members of the Water Board were there, was Mr. Koenig there?

A. I am inclined to think that Mr. Koenig was not there.

Q. Was Mr. Hipple there?

A. Yes, sir, that is my recollection.

Q. Was Mr. Coad there?

A. I think so.

Q. Was Mr. Howell present?

A. I think Mr. Howell was present.

Q. Was Mr. Congdon present?

A. I think Mr. Congdon was present.

97 Q. Is Mr. Congdon one of the legal advisers of the Water Board?

A. He is a member of the Water Board.

Q. Does he give the Water Board legal advice?

A. All of his advice I take as a member of the Board, not as a legal adviser.

Q. What I mean is, does he advise the Water Board and give them his opinion on matters of law in connection with their matters?

A. I have sometimes asked him for his opinion on the bearings of particular questions in a legal way and he has answered me.

Q. Now how did that meeting happen to occur in Mr. Webster's office on Sunday, was it by call?

A. By mutual consent.

Q. In what way did the consent come about?

A. Mutually.

Q. Well, how, did you make any call on anybody to be present?

A. Made no official call for any meeting.

Q. Well, I am not asking you for any official call, I am aware that whenever you did anything in that Water Board you did it informally and afterwards made a record of it; did you yourself notify anybody to be present?

A. Not that I remember of.

Q. If you had done that you would remember it?

A. Yes, if it had been a regularly called meeting I should have remembered it.

Q. Yes, but if it were an unofficial uncalled meeting, and you had asked anybody to come to that meeting you would have remembered it?

A. Yes, I would be likely to.

Q. Then your opinion is that you did not ask anybody to come to that meeting?

A. Not unless I met them on the street or in the office.

Q. Had you had any meeting previous to that, what I mean is had you met any of these members of the Board on Saturday previous to this meeting on Sunday?

A. I presume that I had.

Q. Do you remember who you met?

A. No.

Q. Did you ask anyone that you met to be at Mr. John L. Webster's office on Sunday?

A. I don't remember of any particular case.

Q. When Mr. Wright met you on Saturday evening was it talked between you that there should be a meeting on Sunday?

98 A. I had no conversation with Mr. Wright personally on Saturday evening that I remember of.

Q. In what way was your communication with Mr. Wright held on Saturday evening?

A. My recollection is that it was by 'phone that I got the information.

Q. Where was Mr. Wright at the time he 'phoned you?

A. My recollection is that Mr. Wright did not 'phone me.

Q. Who was it 'phoned you?

A. I think it came from the telegraph office.

Q. From the Western Union Telegraph office?

A. I think so.

Q. Did you get that telegram the next day?

A. I presume so.

Q. Have you got it now?

A. No sir.

Q. What have you done with it?

A. I presume that Mr. Koenig has it, I am not sure.

Q. Then you did receive a written communication from Mr. Wright?

A. Yes, I think so.

Q. You were mistaken then, when you said there was no written information from Mr. Wright wasn't you?

By Mr. WEBSTER: The defendant objects to the question, he has not said that.

A. I don't think I said that.

Q. If you did say it you were mistaken weren't you?

A. If a telegram would be covered by that, why then I was mistaken.

Q. You haven't any doubt in your mind have you that a telegram is written?

A. No, I would regard a telegram as a writing.

Q. Now, was that telegram signed by Mr. C. C. Wright?

A. That is my recollection, it was signed by Mr. C. C. Wright.

Q. Mr. Wright was the official attorney of the Water Board was he?

A. He was, yes.

Q. And that was directed to you as chairman of the Water Board wasn't it?

A. I could not say whether it was directed as chairman or not.

Q. Well, your best memory.

A. I could not answer, I don't know whether it was addressed to me personally or as chairman.

Q. Where was that telegram sent from as shown by its face?

A. I think it came from Chicago.

Q. So that as early as Saturday, the 7th day of July, you had had information from your attorney who was on the ground as to the report?

99 A. Yes, sir.

Q. What was Mr. Wright doing in Chicago at that time?

A. I was not with him.

Q. Don't you know?

A. I presume from his telegram, that he was paying some attention to the matter contained in the information, what other business he was attending to there I don't know.

Q. Weren't you paying him for his bills on that day, and didn't you pay his bills for expenses on that day?

A. I couldn't say whether we paid Mr. C. C. Wright for any bills incurred by him on that date, the records would show.

Q. How long had he been in Chicago at that time?

A. I could not say.

Q. As near as you can.

A. Possibly twenty-four hours.

Q. Had you had any other telegrams from him?

A. I think not.

Q. Do you know when he left to go to Chicago?

A. I do not.

Q. You saw on Sunday in the morning papers the account of that award, didn't you?

A. If it was printed on Sunday morning, I probably saw it

Q. Have you forgotten it?

A. Yes, as to dates.

Q. Did you, yourself, as chairman of the Water Board give any reports of that award to the daily papers?

A. No sir.

Q. Were you interviewed by any members of the press about it?

A. Not that I remember of.

Q. If you had been would you remember it?

A. I might or might not, I wouldn't consider it of any special importance to charge my memory with.

Q. Had you talked with anybody about it on the streets that day, Saturday?

A. I think not.

Q. Are you sure of that?

A. Yes, quite sure.

Q. Did you talk with anybody about it Sunday outside of this meeting that you say was unofficial and informal?

A. No one that I know of except the members of the Board.

Q. Under these circumstances did Mr. Wright advise you to call a meeting?

A. I think not.

Q. Did he say that he would be here in that telegram, that he would be here Sunday?

A. If he did I don't remember it.

Q. When did you see that telegram last?

A. I don't remember.

Q. I wish you would produce that now, Mr. Webster and Mr. Wright.

100 By Mr. WRIGHT: If we have got it we will.

By Mr. HALL: How long will it take you, Mr. Wright, to produce that telegram?

By Mr. WRIGHT: Why if we have got it I suppose we can produce it this afternoon.

Q. Now, Mr. Barlow in this meeting that you had in Mr. John L. Webster's office, Sunday, July 8, 1906, you remember the meeting now?

A. I remember that we met, yes.

Q. Mr. Wright got in that morning from Chicago did he and was present?

A. I think so.

Q. Did he have with him at that time a formal copy of the appraisers report or only an informal statement of it?

A. I don't think Mr. Wright had any copy of the report with him.

Q. Did you talk the matters over with the other gentlemen here and Mr. Wright?

A. Yes sir.

Q. Did both your legal advisers participate in the talk?

A. My recollection is they did.

Q. Did Mr. Congdon participate in it?

A. Yes sir, I think so.

Q. Who did Mr. Wright say he had his information from on Saturday?

A. I think he had talked to Mr. Alvord.

Q. Did you regard Mr. Alvord as an official in this matter or not?

A. I don't think I understand what you mean by official.

Q. Well, would you regard information as coming from Mr. Alvord as official or unofficial?

A. I would not regard that as an official report, no sir.

Q. I am not asking you about an official report, I am asking you whether you would regard information coming from Mr. Alvord as official or unofficial information?

A. I would regard that information as unofficial.

Q. And that is what you meant in the early part of your examination when you said you had no official information was it?

A. Yes sir.

Q. Your methods in the Water Board are to have informal meetings at which you discuss your matters, and then have a formal meeting at which you enter on your records what you agreed to in in your informal meetings isn't it?

A. No sir, I would not say that we had any such method.

Q. Well, you do that frequently, don't you?

A. We meet informally frequently, yes sir.

Q. No, never mind that, the question, just answer the question please; you frequently do your business in the Water Board in that way don't you, Mr. Barlow, by having informal meetings in which you agree upon what you will do, and then have a formal
101 meeting in which you enter upon the records what you agreed to in your informal meetings?

A. We frequently meet and discuss a proposition; we sometimes conclude a mode of acting upon a question, and we officially meet and act upon the question.

Q. Allow me to call your attention, Mr. Barlow, that the answer which you have made does not answer the question which I have put to you. I am asking you—

By Mr. WRIGHT: I will say that it does, Mr. Hall.

Q. —whether it is not true that you frequently do business in that way, that is by having an informal meeting in which you agree on what course you will pursue and then subsequently having a formal and official meeting in which you enter on the records what you have agreed to in your informal meeting?

A. My answer is the same.

Q. You decline to answer, then, whether you do that frequently or not?

A. We have done that a number of times. I want to say it is not a custom; we frequently do that but not as a custom, nothing obligatory about it, when occasion occurs we may discuss a proposition and make a conclusion on a particular question we have met and passed on it in that way.

Q. In those meetings it is customary is it not, to have your lawyers present?

A. We have discussed questions without the presence of the lawyers; if there is a legal question at issue we then endeavor to have one or both of our attorneys present to discuss the matter with us.

Q. You hold these informal meetings mainly for secrecy do you not and keeping your own counsel?

A. No sir.

Q. Now going back to this particular meeting at John L. Webster's office which was held on July 8th, wasn't it, I have the date right, haven't I?

A. I believe so.

Q. Who was present when you arrived?

A. I don't remember.

Q. Did you at that time have any legal advice with reference to this award of the appraisers?

A. I would not say that we had any legal advice but simply——

Q. Well, the lawyers expressed their opinion didn't they?

A. Yes, I presume they did, opinion rather than advice.

Q. Referring now to this interview in the United States National Bank, when Mr. Woodbury tendered you the deed, did you ask for a copy?

A. No sir.

Q. Didn't you at that time state that the City of Omaha
102 would never pay it, and would never consent to the appraisalment?

A. I think not.

Q. Will you say you did not?

A. Yes; I saw it printed in the paper afterwards, that I had said so, and I remembered that that was contrary to my idea.

Q. As a matter of fact, you fully expected to pay it didn't you, Mr. Barlow; never had any idea of not paying it if you only had time to get the money?

A. I never had any idea that we would pay it.

Q. Don't you know that it was agreed all along that you would not pay it?

A. No sir.

Q. Did I understand you, Mr. Barlow, to say, that you did not know how long Mr. Wright had been in Chicago?

A. I do not know, no sir.

Q. Do you wish to be understood that you did not know he was going to Chicago before he went?

A. No sir, I do not wish to be understood that way.

Q. Did you know that he was going to Chicago before he went?

A. I did.

Q. When did you learn of that?

A. I think it was about twenty-four hours before that, possibly forty-eight hours.

Q. That would be along about Tuesday or Wednesday before this Saturday that you have spoken of?

A. No, I don't think it would be earlier than Thursday before.

Q. You had a regular meeting of the Water Board on Wednesday, didn't you, of that week?

A. I don't know, the records would be the better evidence on that.

Q. Don't you remember about that?

A. I don't remember.

Q. Did you have any talk with Mr. Wright along about Wednesday of that week about that meeting?

A. I presume so, I talked with him before he went to Chicago.

B. Didn't you talk with him at that meeting about his going to Chicago?

A. I don't know that we had a meeting.

By Mr. WEBSTER: The only way to answer these questions is to answer them according to the facts regardless of what the question asks.

Q. You are forgetful about that are you, Mr. Barlow, whether you had a meeting or not?

A. I don't remember whether we had a meeting or not.

Q. Do you think it was at the meeting?

103 A. I don't know where we were when we talked.

Q. You remember of talking with him?

A. Yes sir.

Q. Who was with you when you talked with him do you remember?

A. I think there were other members of the Board.

Q. Who for instance?

A. I don't know.

Q. Can you tell any of them?

A. Don't remember any particular member.

Q. Was Mr. Webster there, Mr. John L. Webster?

A. Well, sir, I don't remember whether he was or not.

Q. What would be your best impression of that?

A. My best impression is that there were other members of the Board.

Q. It was understood wasn't it that whenever that meeting was, and however informal and unofficial it was, that Mr. Wright was to go to Chicago?

A. Yes sir.

Q. And he was to go for the Board to Chicago on the question of this appraisement, wasn't he?

A. Yes sir.

Q. Was that action of the Board in sending Mr. Wright to Chicago in the way you have indicated in your opinion official or unofficial?

A. Unofficial.

Q. In your opinion would Mr. Wright's bills for that service be a proper charge against the Water Board or not?

A. I would regard it as a proper charge.

Q. In this meeting that you speak about where it was arranged that Mr. Wright should go to Chicago, was it explained in that meeting at all that he was called there by Mr. Alvord?

A. No sir.

Q. Was it stated in that meeting that he had any message from Mr. Alvord that would call him there?

A. I think not.

Q. Are you sure of that?

A. I am sure that I do not know of any such thing.

Q. You don't wish it to be understood do you, from your answers to Mr. Webster's questions, that the only reason you did not pay these \$6,263,000.00 was that you really did not have time to get the money together?

A. I don't believe I could explain just what Mr. Webster had in his mind when he asked the question.

Q. I am not asking you what Mr. Webster had in his mind because I know that would be a hard task for you, but I am asking you what you meant, and whether you meant by those answers to have the court understand that the only reason you did not pay these \$6,263,000.00 was that you really hadn't had time to get it together and be prepared with the money?

A. Are you asking for my opinion——

Q. No, read the question? (Question read.)

104 By Mr. WEBSTER: Not what I meant, what you meant.

By Mr. HALL: Just read the question again.

(Question re-read.)

A. No, I don't wish to be understood that that was the only reason.

Q. And you don't wish it understood either that you did not have information enough about what had been done about the appraisal so as to know what the award was, whether the information was official or unofficial, do you?

A. No.

Q. Well, now really, as a matter of fact, you had called your people together, or your people had gotten together as you say by mutual consent the Sunday before that hadn't they, that is, the Sunday before the day that Woodbury tendered you the deed?

A. Yes sir, they were together before.

Q. And they were together on this particular matter weren't they?

A. The particular matter of the——

Q. The appraisal and the award?

A. Yes sir.

By Mr. HALL: I believe that is all, except that I may want to examine Mr. Barlow further on that telegram if you get it.

By Mr. WEBSTER: The respondents here offer in evidence the testimony taken on behalf of the complainants in a suit lately pending in the Circuit Court of the United States within the District of Nebraska, wherein the Water Board — the City of Omaha, and the City of Omaha, were complainants, and Daniel W. Mead, et al., were respondents. Docket "W" No. 209, and being filed in said Court November 6, 1905, excepting from said offer the testimony of E. M. Fairfield. Said testimony being in a case where the City of Omaha was one of the parties complainant, and the Omaha Water Company was a party respondent. Said offer does not include an agreement therein to use the depositions of W. J. C. Kenyon, Patrick J. Sheehy and R. C. Howell.

By Mr. HALL: The testimony is objected to on the ground that it is incompetent, irrelevant and immaterial and not the best evidence.

Witness Barlow here excused, further examination to be resumed upon production of papers as above noted.

E. M. FAIRFIELD, a witness produced on behalf of respondent, being first duly sworn, testified as follows:

Examined-in-Chief.

By Mr. WEBSTER:

Q. State your name, age and residence?

A. E. M. Fairfield; 43; Omaha.

105 Q. And what official relation do you sustain to the Omaha Water Company?

A. I am the general manager of the company.

Q. And you have been for how long?

A. Between six and seven years.

Q. Are you acquainted with Daniel W. Mead, George H. Benzenburg and John W. Alvord?

A. Yes sir, I am.

Q. Do you know those persons named to have been the engineers who were acting as appraisers of the Water Works?

A. Yes sir.

Q. Were you present at the time when the said persons named while acting as appraisers, were engaged in taking testimony in the City of Omaha?

A. Yes sir.

Q. Do you remember of an occasion when the said engineers were so engaged in taking testimony in the City of Omaha?

A. Yes sir.

Q. Do you remember of an occasion when the said engineers were so engaged in taking testimony when a question arose as to whether or not the said appraisers should have an opportunity to see and examine the books of the Water Company?

A. I believe I was present at that meeting, yes.

Q. And do you recall Mr. Fairfield, at that time that Mr. C. C. Wright in behalf of the Water Board of the City of Omaha, requested or demanded that if said books should be presented or examined that the city by its attorney should have an opportunity to see and examine with reference to the same?

A. Yes sir, that is my recollection.

Q. And do you further recollect that at said time that Mr. C. C. Wright in behalf of the City and the Water Board, objected to the said books being presented to the appraisers unless the city by its attorney had an opportunity to be present and examine regarding the same?

A. That was my understanding at that meeting, yes.

Q. Subsequent to the taking of testimony before the appraisers in Omaha, is it not a fact, Mr. Fairfield, that yourself, accompanied by Mr. Stockton Heth, in behalf of the Water Company, took certain books of the Water Company to the City of Cincinnati to be presented to the appraisers for their inspection?

By Mr. HALL: Complainant objects in so far as it calls for the conclusion of the witness that that was done in behalf of the Water Company, which I deny.

A. I did not accompany the books; I went to a meeting of the appraisers in Cincinnati at the request of the appraisers at which meeting the books were produced.

Q. Please give the date that you went to Cincinnati?

106 A. The date I arrived there I believe was February 7th, 1906, I think that was the date set for their meeting, I had the notice of the meeting from the chairman of the board of appraisers.

Q. Who went with you from Omaha to Cincinnati?

A. Mr. Heth.

Q. That is Mr. Stockton Heth?

A. Yes.

Q. And he at that time held what office in the Omaha Water Company?

A. Treasurer.

Q. His office was also at Omaha?

A. Yes sir.

Q. Now, before you actually went to Cincinnati, did you ship the books to Cincinnati?

A. Yes sir.

Q. And in what manner were they shipped, by express or freight?

A. By express, I think.

Q. Now, before you went to Cincinnati, and before you shipped the books, who requested you to ship the books to Cincinnati?

A. The chairman of the Board of Appraisers, Mr. Mead.

Q. In what manner and form did he make that request?

A. In the form of a letter.

Q. Directed to whom?

A. Directed to me.

Q. Will you produce that letter?

A. I have it here, a letter from—oh, it is not addressed to me, it is addressed to the Omaha Water Company.

By Mr. WEBSTER: I offer that letter in evidence and ask that the reporter take a copy thereof and certify to it and return the original to Mr. Fairfield, letter to be marked Exhibit "A" and copy thereof hereto attached, and made a part of this examination.

Offer received without objection.

Q. Did you advise or give information to the Water Board or the City of Omaha or their attorneys of the fact that you were going to ship the said books to Cincinnati?

A. No sir.

Q. Did you make such disclosure or give such information to the City of Omaha or the Omaha Water Board or its attorneys that you had received the letter from Daniel W. Mead referred to?

A. No sir.

Q. You did know, however, that Mr. C. C. Wright representing the Water Board and the City of Omaha in the matter objected to said books going before the appraisers unless he should be present or have an opportunity to examine relating thereto?

A. Yes, I supposed the same objection held good.

Q. Now, what books were sent by you to Cincinnati for the purpose of being presented to the appraisers?

107 A. Well, they were the journals and ledgers and voucher registers for ten years from 1896 to 1905 inclusive. I think those were all, those three classes of books.

Q. That made how many volumes and how large a package?

A. As I remember it, it made two or three boxes weighing several hundred pounds and comprised at least thirty large books, there may have been more, at least thirty, a journal, voucher register and ledger for each year, I presume, I am not certain about that, but in that neighborhood; some of the voucher registers I think covered more than a year.

Q. At what hotel in Cincinnati did you and Mr. Heth stop?

A. Grand Hotel.

Q. And did you have the books opened up at the said hotel after their arrival?

A. No sir, I didn't have anything to do with the books; the books were shipped to Mr. Mead as chairman of the board you know.

Q. And why did you and Mr. Heth go to Cincinnati?

A. Because it was suggested by the Board that it might help them to have some one on the spot to explain the methods of book-keeping, save them time.

Q. How was that suggested by the Board?

A. That was suggested in another letter from Mr. Mead.

Q. Written before or after the letter which you have already produced?

A. That I do not remember, along about the same time.

Q. And was it on the strength of this other letter that you and Mr. Heth went to Cincinnati?

A. Why, yes, I think I can say it was.

Q. Then will you please produce that letter, that the officer taking the deposition may take a copy thereof?

A. I haven't it with me, I think I can dig it up, however.

Q. You may then produce it after the lunch hour to be incorporated into the record. How many days did you and Mr. Heth remain in Cincinnati?

A. I think we stayed there three or four days during the continuance of the appraisers' meeting, whenever that was, 7th, 8th, 9th and 10th of February, I think.

Q. Do you know, as a matter of fact, whether the books were delivered to the Board, and were opened and examined at the meeting of the Board at Cincinnati?

A. The books were in the room where they were meeting, the boxes had been opened, some of the books were on a table they were using.

Q. And were you and Mr. Heth at that time asked any questions by any member of the board relating to the contents of the said books?

108 A. No, I don't think Mr. Heth was present in the meeting room at all, and my recollection is now that they did not get at that meeting, as far as any actual examination of the books.

Q. Well, you stated the books were opened up and some of them were laying out on the tables.

A. I don't know, they may have examined them, I don't know of my own knowledge that they did, at least we were not called upon to explain any of the methods at that time, as I remember it now.

Q. Well, you know the fact, however, that the books were opened up in the board room and taken out of the boxes?

A. Yes sir.

Q. And were spread out upon the tables?

A. Some of them were out on the table, I remember that, I don't think they were all out of the box.

Q. And how many times were you in the room to see the books on the tables as you have described them?

A. Oh, I should think two or three times.

Q. And what members of the Board of Appraisers were in the room when you were in there on these different occasions?

A. All of them.

Q. And when you were in the room where these appraisers were, did you or did you not have some talk with the appraisers about what they were doing relating to the books?

A. Well, I don't know that, I can't say that. They were discussing, at least they told me they had been discussing the method which the examination of the books would pursue, or rather what method they should pursue with reference to the examination of the books.

Q. Did you know at that time that Mr. C. C. Wright in behalf of the Water Board of the city had sent to Daniel W. Mead, as chairman of the Board, a written protest against the Board examining these books unless he should be present and permitted to cross examine?

A. Yes, sir, they informed me to that effect.

Q. That is, the Board informed you?

A. Yes sir.

Adjournment was here taken to 2 o'clock P. M., December 26th, 1906.

2 O'CLOCK P. M., Dec. 26th, 1906.

Q. Was that information given to you at the time when you were in the room where the Board met at Cincinnati, Ohio?

A. Yes as I remember it, Mr. Wright's letter was handed me to read.

Q. Mr. Fairfield, did you during the noon recess find the other letter from Mr. Mead, requesting you to personally go to Cincinnati?

109 A. No, I did not, in the file, which it ought to be in, and it is not there and I did not have time for any more extended search; of course I may be mistaken about having a letter, but my impression is that I have; the request may have come in some other way; I have not an absolutely circumstantial recollection of the fact, but I know that a suggestion came from the Board of Appraisers.

Q. Well, will you be kind enough to make further search and to

think over that matter further, and when you appear to-morrow morning perhaps speak of it further?

A. Yes, I will try and look it up.

Q. Mr. Fairfield, after the meetings with the Board of Appraisers at Cincinnati, already spoken of by you, what was next done with these books which you had shipped to Cincinnati?

By Mr. HALL: Objected to unless the witness knows of his own knowledge.

A. The books were left with the Board.

Q. Do you know how long the books remained at Cincinnati?

A. No, I don't.

Q. Do you not know, Mr. Fairfield, that the books were shipped from Cincinnati to Chicago for the purpose of being examined by an auditor?

By Mr. HALL: Objected to as leading, suggestive, and because it would be hearsay testimony that witness knows, if at all.

A. That is the only way I know it, of course I have no personal knowledge of that.

Q. You mean by that you know it only by hearsay?

A. Yes sir.

Q. Well, from whom did you get your information?

By Mr. HALL: Objected to as to any knowledge that the witness obtained by hearsay as incompetent.

A. Well, Mr. Mead told me, that that was what they were going to do.

By Mr. HALL: Move to strike out what Mr. Mead told him.

Q. Was that information given by Mr. Mead in the Board room or was it private conversation between Mr. Mead and yourself?

A. Well, that I do not remember exactly, Mr. Mead told me, whether it was in the room of the Board, or whether it was afterwards I don't quite recall; that the Board had decided to leave the matter of the examination of the books in the chairman's
110 hands with authority to secure some one competent to examine them for the Board and that they were going to take the books to Chicago for that purpose.

By Mr. HALL: Move to strike out all that Mr. Mead told the witness, as hearsay, incompetent.

Q. Were you subsequently informed as to whether or not that examination was made in Chicago?

By Mr. HALL: Objected to as incompetent, leading, suggestive, calling for hearsay testimony.

A. I was, yes.

Q. And from whom did you get your information?

By Mr. HALL: Objected to as incompetent, leading and suggestive, calling for hearsay testimony.

A. Well, that was also from Mr. Mead and from Mr. Heth.

Q. And when was it that Mr. Mead gave you that information?

By Mr. HALL: Objected to as incompetent, hearsay testimony, not the best evidence.

A. Well, I think that was also contained in a letter; I do not think I have seen Mr. Mead since then, I am quite sure I have not.

Q. That was by letter?

A. I think so.

Q. Then by tomorrow morning will you produce that?

A. I will try to look it up too.

Q. Mr. Fairfield, what was the name of the auditor who made the examination of the books?

A. I do not know, some Chicago auditing company.

Q. Were you furnished a copy of the report made by that auditing company?

A. No, I believe not.

Q. Haven't got a copy of it?

A. I don't think I have ever seen one.

Q. Did you have more than one letter from Mead relating to the result of that examination.

A. I don't think so.

Q. Did you have any letter from Mr. Benzenberg relating to that examination?

A. No, I am not at all certain that I did get such a letter from Mr. Mead, although I think I did.

Q. Well, wouldn't the bill for that auditing work show you what auditing company made that examination?

A. Why I knew at the time, whether the information was derived from Mr. Mead's bill, or from his letter, I am not quite certain, now, I can find that out I guess; it was something like the Chicago Audit Company, or something similar to that.

Q. How long did the books remain in Chicago?

A. My impression is about a week, perhaps four or five days, I do not recall now.

Q. You do not mean to say that an auditing company went through that many books in a week do you?

A. Well, they had two or three men working on it, I understood, it may have been a longer time than that, I am not sure.

Q. Isn't it a fact that those books remained in Chicago about a month?

A. I don't know, perhaps they did, I have a very indistinct recollection of that period.

Q. Well, do you know the date when they were returned to the officers of the Water Company at Omaha?

A. No.

Q. Have you any record that will show you the date they were returned here?

A. I don't believe we have.

Q. Wasn't there some communication to tell you when the books were returned or would be returned either from the auditing company or from Mr. Mead?

A. I should think there naturally would, I don't remember any now, if there is any I can doubtless find it.

Q. I wish you would look that up and tell me the time when the books were returned to the offices of the company in Omaha?

A. Very well.

Q. Were you in Chicago during the time the books were in Chicago in the hands of the auditing committee, or in charge of Mr. Mead?

A. No sir.

Q. Was Mr. Heth?

A. Yes, he was there for a part of the time.

Q. Did Mr. Heth go from Cincinnati to Chicago with the books?

A. No, he had nothing to do with the books. Mr. Mead suggested that he remain in Chicago and give the auditors any information or help that he could in reference to checking the books against the statement.

Q. And to accomplish that end did he go from Cincinnati to Chicago?

A. Yes, he went in to Chicago.

Q. And had you in your Omaha office here prepared for the benefit of the appraisers, a statement from the books?

A. Yes sir.

Q. And was that statement delivered to Mr. Mead as chairman of the Board of Appraisers?

A. Yes sir.

Q. And who prepared that statement?

A. I don't remember whether Mr. Heth or myself did, it was taken from the totals in the back of each ledger.

112 Q. And what eventually became of that statement?

A. It was turned over to Mr. Mead, I guess he still has it.

Q. Turned over to him at Cincinnati?

A. I think it was sent to him before that meeting, some little time before, as I remember it.

Q. How sent to him, by mail?

A. That is my recollection.

Q. And was that sent to him prior to the date of the letter which you produced this forenoon, bearing date January 31st?

A. Oh, I think so, I think it was sent early in January; my recollection is that we furnished a statement in 1905 before the end of the year, 1905, which then of course did not include the calendar year 1905, that we afterwards, early in January, 1906, supplied a second statement which ran down a year further you see, included 1905.

Q. Now at whose instance or request did you prepare and present to Mr. Mead these statements?

A. At his request.

Q. And was that request by Mr. Mead made to you in writing?

A. Yes sir.

Q. Then will you please, to-morrow morning, produce the letter or letters from Mr. Mead, making such request, and copies of the letter which you wrote transmitting the statement?

A. Yes, sir, if I can get them, I think I have them all.

By Mr. WEBSTER: I may want to ask you some more questions about those letters, or in the event they are not found, I may want

to ask some more questions concerning the transactions, but until they are found I will forego any further examination of you and question Mr. Heth now.

By Mr. HALL: The cross examination is reserved until the direct examination is finished.

STOCKTON HETH, a witness produced on behalf of respondent, being first duly sworn, testified as follows:

Examined-in-Chief.

By Mr. WEBSTER:

Q. State your name and age.

A. Stockton Heth; 38; Omaha.

Q. What official relation do you sustain to the Omaha Water Company?

A. Treasurer.

Q. And have been for how many years?

A. Seven or eight years.

Q. Mr. Heth, you are acquainted with Mr. Mead and Mr. Benzenberg and Mr. Alvord, the engineers who were engaged in the appraising of the water works?

A. Yes sir.

113 Q. And you are the Mr. Heth referred to by Mr. Fairfield as one of the persons who went to Cincinnati at the time when the books were before the Board of Appraisers?

A. Yes sir.

Q. Now what books of the Water Company, Mr. Heth, were sent to Cincinnati?

A. Why, the general ledgers, journals, voucher registers and cash books.

Q. And they made about how many books in all, in numbers?

A. Oh, I should say thirty or forty books.

Q. And covered how many years of business of the company?

A. Nine or ten years.

Q. And about what bulk?

A. Well, I could not state about the weight, I should say they were put in two or three boxes, made several hundred pounds.

A. And how were they transmitted or shipped from Omaha to Cincinnati?

A. By express.

Q. And Mr. Heth what is the distance from Omaha to Cincinnati, approximately?

A. I could not tell you, sir.

Q. Well, you went from Omaha to Cincinnati, didn't you?

A. Yes, sir.

Q. Paid your fare?

A. I think so.

Q. And these same books that were shipped to Cincinnati were books that were in the offices of the Water Company in Omaha at the time when the engineers were holding their meetings in Omaha, for the purpose of taking evidence were they not?

A. Yes sir.

Q. And the office- of the Water Company, they were and still are in the Bee Building of the City of Omaha?

A. Yes sir.

Q. And that building adjoins the City Hall, where the appraisers were holding their meetings while taking evidence?

A. Yes, I think so.

Q. You know of the fact that the question whether or not the appraisers would or should examine the books of the Water Company was a matter which was called to their attention at the time when they were holding their meetings in Omaha?

By Mr. HALL: Objected to as leading, suggestive and cross-examination of his own witness.

A. No sir, I was not at the meeting.

Q. Were you in the room where the Board of Appraisers were holding their meetings in Cincinnati?

A. No sir.

Q. Well, at whose instance did you go to Cincinnati?

A. At Mr. Fairfield's.

Q. For what purpose?

114 By Mr. HALL: Objected to as calling for a conclusion.

A. To assist if possible, in stating the way we keep our books and to facilitate matters if there was any occasion for my being there.

Q. Well, state to whom the matter of keeping your books and facilitate who?

A. Why the appraisers.

Q. And did Mr. Fairfield indicate to you that that was his purpose in having you go to Cincinnati?

A. Yes sir.

Q. Now, had you, Mr. Heth, received any request or direction from the board of appraisers or any member of the board to go to Cincinnati or that your presence was required there?

A. No sir.

Q. How many days did you remain in Cincinnati?

A. Why, I should say about four or five days.

Q. And then where did you go?

A. Went up to Kentucky, Richmond, Kentucky.

Q. Then where?

A. Then to Chicago.

Q. What did you go to Chicago for?

A. At Mr. Mead's suggestion.

Q. What did Mr. Mead say to you that caused you to go to Chicago?

By Mr. HALL: Objected to as hearsay and incompetent.

A. Well, he stated that the books were to be placed in the hands of an auditing company for the purpose of auditing and he thought that I might be of some assistance to the audit company in stating our system of keeping books and might facilitate matters there to some extent.

Q. Where were you when Mr. Meade made that statement to you?

A. Why, I was in the Grand Hotel, Cincinnati.

Q. Was that statement made to you in the presence of Mr. Benzenberg?

A. No sir.

Q. Or in the presence of Mr. Alvord?

A. No sir, I think not.

Q. Do you know whether Mr. Benzenberg or Mr. Alvord had any information that you were to go to Chicago in connection with these books?

A. I cannot state that definitely.

Q. Well, how long did you remain in Chicago in connection with this matter?

A. Well, I was there about, I should say, five or six days.

Q. And doing what?

A. I didn't do much of anything.

Q. Well, were you having conferences with the auditing committee or the audit company?

A. Yes sir, I went up several times to their offices.

Q. And what company of persons were examining the books?

A. The American Audit Company.

115 Q. And their offices were where?

A. Why, I think in the Marquette Building as I remember now.

Q. How long did the books remain in the charge of this Audit Company?

A. Why, I should say off-hand, about two weeks.

Q. And the books were up in the offices of the Audit Company while you were there?

By Mr. HALL:

Q. Mr. Heth, do you know of your own knowledge?

A. No sir, I do not.

By Mr. HALL: I move to strike out the answer of the witness that they were there two weeks, as a statement of mere hearsay testimony, and incompetent.

A. Why I saw some of them while I was there.

By Mr. WEBSTER:

Q. Do you know the time when the books were returned to the offices of the Water Company in Omaha?

A. Not—I can find out, I cannot state off hand now just the date they came back.

Q. Well, you may then find out and tell me in the morning the date when they were returned.

Mr. HALL: Well, you don't want two people to tell you that, if Mr. Fairfield can tell you there is no use in two.

By Mr. WEBSTER: Yes, if Mr. Fairfield can tell me that will be sufficient.

Q. During the time that you were in Chicago did you have any conferences with Mr. Mead relating to these books or their contents?

A. Just one, or I think twice, I saw him twice.

Q. And where?

A. At his offices in the First National Bank Building, in Chicago.

Q. And talked over with him what subject matters?

By Mr. HALL: Object to that as leading and assuming, the question put to the witness should be what was done.

A. Well, do you want me to—I could hardly answer that question without some explanation there.

Q. Did the subject matters of your talk relate to these books and their contents?

A. Yes sir.

Q. Now, Mr. Heth, prior to that time had you prepared or taken part in preparing a statement of the books of the Water Company?

A. Yes sir.

116 Q. And do you remember the time when that statement had been transmitted to Mr. Mead?

A. No sir.

Q. If you can't state the date, you remember the fact do you, that such statement had been transmitted to Mr. Mead?

A. I cannot state that.

Q. Well, was the statement which you speak of as having been prepared, prepared for the purpose of having been presented to Mr. Mead or the Board of Appraisers?

A. I didn't prepare it for Mr. Mead.

Q. What did you do with it?

A. I gave it to Mr. Fairfield.

Q. Didn't you know what Mr. Fairfield wanted it for?

A. I presumed that he wanted it for that purpose.

Q. Now was that statement one of the matters talked over between you and Mr. Mead while you were in Chicago?

A. No sir.

Q. At the time when you had these conversations with Mr. Mead in Chicago that you have referred to, had the Audit Company at that time made its report?

A. No sir.

Q. Did you see the report which the audit company made?

A. No sir.

Q. You knew the fact did you not, Mr. Heth, that a bill had been sent out to the water company to pay the audit company for the examination, and the making of a report?

By Mr. HALL: Objected to as calling for hearsay testimony and incompetent.

A. No, sir, I did not know about that.

Q. Well, as treasurer wouldn't the payment of that account pass through your hands?

A. Well, it might not have come from the audit company.

Q. Well, I do not know who it came from.

A. I do not recall now, it seems to me it was paid by the appraisers, and the bill sent to us afterwards, we didn't pay any bill.

Q. You think the bill was paid by the appraisers, and that they sent a bill to you?

A. Yes sir.

Q. Do you remember the amount of that bill of the audit company?

A. No sir, I don't now.

Q. Do you recollect whether that bill did or did not show the length of time the audit company were engaged in making that examination?

A. No sir, I do not remember that.

Q. Who would be the custodian of that bill, yourself or Mr. Fairfield?

By Mr. HALL: Objected to as assuming a bill, assuming the whole matter.

117 A. Well, that would be rather hard to say, it is part of the files of the office I should say.

Q. Well, will you please look for that bill and produce that in the morning?

A. Yes sir.

Q. What number of the Board of Appraisers, if any one of them, lived in Cincinnati?

A. Mr. Benzenberg, I don't know whether he lived there, he had business there with the Water Works.

By Mr. HALL: Move to strike out as not responsive and as immaterial and irrelevant.

Q. Mr. Mead's office was in Chicago was it not?

A. Yes sir.

Q. And Mr. Alvord's office was in Chicago?

A. I don't know where his offices were.

Q. Didn't Mr. Benzenberg live in Milwaukee?

By Mr. HALL: Object to that as leading and suggestive, and also because it is not within the knowledge of this witness, where he lives.

A. I don't know where he lives.

Q. Well, do you know as a fact that Benzenberg had an office in Cincinnati?

A. No sir.

Q. Did you know any reason why these books should go to Cincinnati instead of going some place that would be convenient to this Board of Appraisers, why go to Cincinnati and then ship them up to Chicago, do you know any reason for that?

By Mr. HALL: Objected to as immaterial and argumentative, leading and suggestive.

A. I don't know any reason especially except possibly the Board was meeting there at the time, that would be the only reason.

Q. At whose instance do you know was this meeting called to be held in Cincinnati?

By Mr. HALL: Objected to as not in the knowledge of the witness and argumentative and leading.

A. I don't know at whose instance the meeting was called.

Cross-examination.

By Mr. HALL:

Q. Do you know any reason why the meeting should not have been held in Cincinnati?

A. No sir.

Q. It was just as easy for you to take the books over there as to have three appraisers come to Omaha, wasn't it?

A. I should think so.

118 Q. Mr. Heth, Mr. Webster asked you whether you had some conferences with Mr. Mead, what do you understand by a conference?

A. Well, when several people get together——

Q. You don't mean that you had any long extended interview with Mr. Mead, do you?

A. No sir.

Q. You met Mr. Mead twice, did you?

A. I should say that we at least met twice.

Q. Well, if you met him more than twice, did you meet him more than twice, is that right?

A. Well, I will change it, I think three times.

Q. Were those meetings of any particular duration?

A. No sir.

Q. State what was said at any of those meetings, Mr. Heth?

A. At the first meeting, or the first time I called on him, was in the First National Bank Building there on Monday after getting into Chicago?

Q. You reported there, didn't you, to him?

A. Yes sir.

Q. To know what you were to do?

A. Yes, and he told me that the books had not arrived and they would probably be there within the day, and that he had made some arrangements with some representatives of the Chicago Audit Company to be there, and asked if I could come back later in the afternoon, so I went back after lunch, probably two or three o'clock, and the books or boxes, several boxes were there, they told me that the books had arrived and there were two representatives of this audit company there, and I was introduced to them, and Mr. Mead stated that he was going to turn these books over to them for the purpose of auditing, etc., and if I could be of any assistance to them, call on me.

Q. You were to answer anything that they wanted to know?

A. Yes sir.

Q. Was that all that occurred in these various interviews that you speak about?

A. That is practically all, yes.

Q. And you did not have anything to do with auditing them, in any way, did you?

A. No sir.

Q. If they asked you any question you answered it was that all there was of it?

A. Yes sir.

Q. You didn't have anything to do with making any complications in any way, did you?

A. No sir.

Q. You never knew what the report was?

A. No sir.

Q. Now when was it in Cincinnati that Mr. Mead told you that the board had made arrangements to have this auditing company examine these books?

A. I think it was Friday evening.

Q. Was Mr. Alvord there at that time in Cincinnati?

A. Yes sir.

119 Q. Did you meet Mr. Alvord there?

A. Yes sir.

Q. Did he say anything to you about the books being sent up to that audit company?

A. No sir.

[Q. Did he say anything to you about the books being sent up to that audit company?

A. No, sir.]

Q. Did he say anything to you about the books?

A. No sir.

Q. How many times did you see Mr. Alvord there?

A. I saw him every day, probably three or four or five times a day.

Q. The appraisers were having a session there, were they?

A. Yes sir.

Q. What time in the day was it that Mr. Mead told you on Friday that the Board had resolved to send the books up to some audit company to audit?

A. I think it was after dinner Friday evening.

Q. Had you seen Mr. Alvord there that day?

A. Yes sir.

By Mr. HALL: If there is anything more to-morrow on these letters I will cross examine him further.

Adjournment was here taken to 10 o'clock A. M. December 27th, 1906.

10 O'CLOCK A. M., December 27th, 1906.

Hearing was resumed pursuant to adjournment, and the following proceedings were had:

E. M. FAIRFIELD, recalled on behalf of respondent.

Examined.

By Mr. WEBSTER:

Q. Mr. Fairfield, have you brought with you this morning the letters from Daniel W. Mead, referred to in your testimony yesterday?

A. No, I haven't, I didn't seem to be able to put my hands on the letter that you thought I had, containing the suggestion that we go down there with the books, that was the one you have in mind?

Q. That was one of them.

A. If I have such a letter I do not know where it is. I was certain that the suggestion came from the Board, but it may have been in some other form than by letter.

Q. Have you made search to find the letter?

A. I have, yes; I have not made as complete a search as I may be able to, because I find that my files in reference to the correspondence in this appraisal matter are rather mixed up, they are not
120 filed by dates or anything of that sort, and there is a great mass of them and I may be able with more time to turn it up.

Q. Did you find the statement of account of the Audit Company?

A. Yes, I have that, in the form of a bill from Mr. Mead, and his voucher which contains the item paid by the Board to the American Audit Company; I have that with me.

Q. Will you let me look at that?

(Produces paper.)

Q. I presume the city got a similar bill. Just for my information, Mr. Fairfield, I do not detect that part of it which would relate to the auditing bill of the American Audit Company?

A. No, he don't attach the bill, I presume he retains the original bill himself, but that is the item of his account.

By Mr. HALL: Don't you intend to offer that, Mr. Webster?

By Mr. WEBSTER: Well, I want to offer that part relating to the audit account.

Q. Mr. Fairfield, I observe in the bill which you handed me the following item: "Bill of American Audit Company", in brackets, the words, "By order of Board", \$102.50, that is all there is in that bill relating to the account of the Audit Company, is it, as you understand it?

A. Yes, sir, that is as I understand it.

Q. And that item of \$102.00 to the audit company in that bill appears to have been paid by Daniel W. Mead and then included in his statement of account to the Water Company?

A. Yes sir.

By Mr. HALL: Do you offer that item in evidence?

By Mr. WEBSTER: Well it is in evidence by quoting it, that puts it in.

By Mr. FAIRFIELD: Do you want to pursue this subject any further?

By Mr. WEBSTER: I was going to ask another question.

Q. From that bill are you able to determine the length of time that the audit company were engaged in examining the books?

A. No, sir, I don't know what their per diem charges are.

Q. Mr. Fairfield, when Mr. Daniel W. Mead at Cincinnati showed you the letter of Carl C. Wright protesting against the examination of the books by the Board unless he should be present and permitted to cross-examine, what was said between you and Mr.
121 Mead, if anything, regarding that examination of the books under the circumstances?

A. Well, I think all that was said was that they had received this protest on behalf of the city of Omaha and turned it over to me to read, and asked me what I had to say in reference to it.

Q. And what did you say?

A. I said in effect that I did not see why they should care whether the City or any one else protested against the receiving of books or any other testimony if the Board chose to receive it, that we had sent the books down at their request, the books were there and we were there to expedite their checking if they needed us and I assumed that they would adopt a simple method of taking the books and verifying the statements from them. I think that was about the amount of my comment. Then I was relieved from attendance at the meeting and they continued there in discussion of the matter, I was not present at any of their discussions among themselves, you know, they just called me in to see this letter.

Q. At the time when this letter was shown to you when this conversation took place that you have referred to, was that in the presence of all the three members of the Board?

A. Yes sir.

Q. Why did you not give your consent that the books should be inspected by the representative of the city or that the representative of the city might not be present when the books were examined?

A. Well, there were several reasons, one is that I did not think the information to be gathered from our financial statements was any concern of the City's; it was confidential information; that method of offering such information was supported by precedent; furthermore, the books were there and we were there and it delayed matters a great deal to set another meeting for examination; our attitude has been all along that the City had no right to look into our books.

Q. Well, the purpose of examining the books on the part of the appraisers had to do with the ascertaining of the amount of the appraisement of the water works?

By Mr. HALL: Objected to as calling for the conclusion and opinion of the witness about that, the place is not competent.

A. Well, I assumed that the Board could employ any methods they saw fit to arrive at their values. That they were no more hampered on one side than the other.

Q. Well, you understood at the time, yourself, that the purpose of examining the books and the purpose for which they were
122 sent to Cincinnati was to assist the Board in arriving at a valuation of the water works?

A. I assumed that it was for that purpose, yes.

Q. You recollect the fact, do you, Mr. Fairfield, that a report of the appraisers was received by the Water Works Company at its office in Omaha at or about the 9th day of July, 1906?

A. Yes sir.

Q. Did that come to your office through the mail?

A. Yes sir.

Q. And do you recollect that the 9th day of July was on Monday?

A. That is my recollection, yes, sir.

Q. And on that day, Mr. Woodbury, the president of the Water Company was in Omaha?

A. Yes sir.

Q. And Mr. Woodbury's home is where?

A. It is in Orange, New Jersey.

Q. And the fact is that Mr. Woodbury arrived in Omaha on the Sunday, did he not, the 8th day of July?

A. I think so, yes, Sunday the 8th.

Q. And he stopped in Chicago on his way from his home to the City of Omaha?

By Mr. HALL: Objected to as hearsay.

A. I don't know.

Q. Well, do you remember the fact, Mr. Fairfield, that as manager of the Water Company that you were served by Mr. Koenig, as secretary of the water board with a copy of the resolution passed by the Water Board rejecting the appraisalment?

By Mr. HALL: Objected to as hearsay and for the reason that the paper is the best evidence and the witness' memory of the occurrence is not competent.

A. Yes, I remember something of that sort.

By Mr. WEBSTER: Before I ask any more questions, Mr. Hall, I wish to submit to you the papers which I offered, and which are to be copied and made a part of this testimony.

By Mr. HALL: Well, aren't you going to call Mr. Koenig on that?

By Mr. WEBSTER: Well, Mr. Koenig is out at Ft. Omaha engaged on some work.

By Mr. HALL: I may want to ask him some questions about this; or perhaps Mr. Barlow would do if you will call him back.

By Mr. WEBSTER: Very well, I will have him here.

123 Cross-examination.

By Mr. HALL:

Q. Mr. Fairfield, you have been asked in regard to the position taken by the Water Company that the books of the company were not to be open to general information on the part of the City, I will ask you whether that position was not taken and maintained by the company early in the course of the appraisalment?

A. It was, yes.

Q. And is it not true that the books were offered for the inspection of the appraisers during the course of that appraisalment?

A. They were, yes.

Q. There was nothing new about their being offered in that form for that had been the position of the Omaha Water Company from the beginning, reiterated through the appraisalment was it not?

A. Yes sir.

Q. Now for the purposes of the appraisalment, was there any objection to Mr. Alvord, the representative of the City, examining those books in any way that he desired?

A. Not at all.

Q. You may state whether the appraisers made any examination of the books here in Omaha at all?

A. They did, yes.

Q. That was on the day following the last hearing that was held here, which I think was finished on the 30th of December, 1904, or was it 1905?

A. 1904, I guess.

Q. Who were present at that time?

A. All three appraisers were present.

Q. Where was that?

A. In the office of the Water Company.

Q. Do you remember what books were looked over at that time?

A. There were several of the ledgers looked over.

Q. That examination I presume was a very short one?

A. Yes, merely preliminary, they said they would get at the exhaustive examination of the books at some later time.

Q. Was that statement made by the members of the Board when they all three were together?

A. Yes sir, I think it was made by Mr. Mead.

Q. Was Mr. Alvord there at the time Mr. Mead made that statement?

A. Yes.

Q. Did he object to it at all?

A. No.

Q. You had nothing to do with checking up the books or making any complication in any way, did you, Mr. Fairfield?

A. No, not at all.

Q. I am speaking now with reference to what was done with the books after they were left with the appraisers.

A. In Cincinnati?

Q. Yes.

A. No, I had nothing to do with them.

Q. The books were turned over to the appraisers in Cincinnati were they?

124 A. No, they were shipped to them from Omaha.

Q. So that after they left Omaha until they reached the appraisers they were entirely out of the control of the company in any way?

A. Yes sir. The books were shipped from Omaha to Cincinnati about the 1st of February, and were returned by the audit company, I have not been able to discover the exact date Mr. Webster. We have no record of their receipt, but it was either the last of February or the 1st of March, along there, somewhere.

Q. Those books were correctly and honestly kept, weren't they, Mr. Fairfield?

A. To the best of my knowledge and belief.

By Mr. HALL: I will offer in evidence the rest of this bill as explanatory of the item relating to the audit company and as part of the cross examination of this witness.

Copy of same is hereto attached marked exhibit "B", and made a part of this examination.

It is hereby stipulated between the parties that the following documents may be considered in evidence and read by either party on the

hearing, to-wit: Report of J. D. Cook, Ordinance No. 423, Ordinance No. 430, Contract between Sidney E. Locke and the City of Omaha, Approved July 20, 1880, Ordinance No. 445, Ordinance No. 469, Ord. No. 618, Ordinance No. 1154, South Omaha, Ordinance No. 29, South Omaha, Ordinance No. 1181, South Omaha, said Ordinances of South Omaha being already included in the evidence offered in case No. 209 Doc. "W"; Ordinance from the City of Florence, of date August 13th, 1889, and Ordinance No. 160 of the City of Florence, amendatory of last above, which two last named ordinances are already transcribed in the evidence offered for the case No. 209, Doc. "W"; Contract between the American Water Works Company and East Omaha, of date August 18th, 1890, and Resolution of Dundee of September 7th, 1889, and Resolution of Dundee of December 22nd, 1900, which last three records are already transcribed in the evidence offered for the case No. 209 Doc. "W"; also the Ordinance of election of March 3rd, 1903, No. 5162, passed February 4, 1903, and approved March 2, 1903.

By Mr. HALL: Now if there are any more Ordinances which we find, we can add them to this stipulation.

By Mr. WEBSTER: Yes.

Mr. HETH Recalled for further Cross-examination.

By Mr. HALL:

Q. Who kept the books of the Omaha Water Company?
125 A. I kept the general books.

Q. How long have you kept them?

A. Oh, seven or eight years.

Q. During the time that you have kept them, have they been accurately and truly kept?

A. Yes sir.

Q. And were these books that you took over to the appraisers accurately and truly kept?

A. Yes sir.

The witness excused.

Mr. BARLOW, Recalled for further Direct Examination.

By Mr. WEBSTER:

Q. I hand you paper purporting to be the original report of the appraisers together with certain endorsements thereon, and ask you if that is the original report of the appraisers received by you as president of the Water Board?

A. It is.

Q. And do you recognize the handwriting of Mr. Koenig, the secretary of the Water Board, and the endorsements made thereon under date of July 9, 1906?

A. I do.

By Mr. WEBSTER: I now offer the said purported report as Exhibit "2" in evidence, with the request that the officer shall take a

copy thereof and incorporate — in the testimony, the original to be returned to the Water Board.

By Mr. HALL: Objected to as incompetent and not properly proved.

Q. Mr. Barlow, I show you another paper purporting to be the resolution adopted by the Water Board rejecting the said appraisal, and ask you to state whether that is the original of a resolution adopted by the Water Board of date July 9, 1906?

By Mr. HALL: Objected to as incompetent, not proper method of proof.

A. It is.

By Mr. WEBSTER: Defendant offers the said resolution in evidence as exhibit "3" with the request that the officer taking the deposition shall insert a copy thereof, with the endorsements thereon, in the testimony, the original to be returned to the Water Board.

By Mr. HALL: Objected to as incompetent.

Q. Mr. Barlow, you may state who was the secretary of the Water Board at the time of the meeting, July 9, 1906?

A. Arnold C. Koenig.

Q. I show you a paper purporting to be the original of the 126 minutes of said meeting of July 9, 1906, signed by Mr.

Koenig and ask you to state if that is his signature to the said memorandum?

A. It is.

Q. And I will ask you to state whether the said memorandum is a correct record of the proceedings of said meeting of July 9, 1906?

A. It is.

Q. And ask you to state whether the adoption of the resolution referred to in the said memorandum is the resolution last preceding offered in evidence?

A. It is.

By Mr. WEBSTER: I now offer in evidence the memoranda of the proceedings of the Water Board of July 9, 1906, over the signature of Arnold C. Koenig, the secretary and ask that a copy of the same, marked exhibit "4," shall be attached to this deposition by the officer taking the same, the original to be returned to the Water Board.

By Mr. HALL: Objected to as incompetent.

Cross-examination.

By Mr. HALL:

Q. Mr. Barlow, when did you first see Exhibit "2," the report of the Board of Appraisers?

A. I think I saw it first probably at the meeting, I don't remember to have seen it before.

Q. On the 9th of July, 1906?

A. Yes sir.

Q. Who had it?

A. It was received from the post office by the Secretary.

Q. You don't know of your own knowledge, do you?

A. No, I didn't see him receive it.

Q. All you know about that is what he told you?

A. Yes.

Q. He may have received that so far as you know on Saturday?

A. So far as I know personally.

Q. Was there a letter with it when you saw it?

A. I don't remember of any letter being with it.

Q. What is your best impression about that?

A. I didn't see any letter, I don't know whether there was a letter or not.

Q. You say you didn't see any, you are sure of that, that you didn't see any letter with it?

A. I don't remember to have seen any.

Q. When Mr. Wright saw you on Sunday, did he have substantially the same information that is in this report?

A. So far as the amount was concerned, my recollection is that Mr. Wright's amount, as he understood the appraisement, agreed with this amount as given here.

Q. Calling your attention now to the resolution passed by the Water Board on July 9, 1906, which the reporter has marked exhibit "3," I see it is in typewriting, that is right, isn't it?

A. Yes sir.

127 Q. Was that drawn by Mr. John L. Webster?

A. I think that was drawn by Mr. John L. Webster and Mr. C. C. Wright.

Q. At the meeting which you had Sunday, and about which you have testified, and at which Mr. C. C. Wright, Mr. John L. Webster and Mr. Isaac Congdon were present, was it agreed informally that such a resolution should be passed by the Water Board?

A. There was no agreement entered into at that meeting that I remember of.

Q. Well, was it understood in that meeting that such a resolution would be passed at the meeting Monday of the Water Board?

A. The conviction, I think, of each member of the Water Board was to reject the appraisement as offered; that was a conviction of, I think, rather than any agreement, conviction or conclusion of each individual, no agreement about it.

Q. Was that conviction or conclusion of each member expressed at the informal meeting which you had on Sunday at Mr. Webster's office?

A. I received that impression at that meeting.

Q. Mr. Barlow, I am not asking you about your impression, I am asking you about a fact; was that conviction or conclusion of the individual members expressed at that meeting which was held in Mr. Webster's office on Sunday?

A. As near as I can remember I would say that each member at that time so expressed himself.

Q. At that informal meeting on Sunday at Mr. Webster's office was the formal meeting which was to take place on Monday spoken of?

A. Yes, the formal meeting was spoken of, I could not say that

they had agreed upon a time at that meeting when they should meet and record their convictions.

Q. But it was understood that the formal meeting was to be some-time Monday?

A. They would have a meeting, yes sir.

Q. And that was understood in the informal meeting which you had on Sunday at Mr. Webster's office?

A. Yes sir.

Q. What time of the day was that informal meeting held at Mr. Webster's office on Sunday?

A. I could not say positively, my impression is that it was in the forenoon.

Q. Was there a stenographer present at Mr. Webster's office during that morning?

A. I don't remember whether there was or not.

Q. The resolution, exhibit "3," which you say was prepared by Mr. Webster and Mr. Wright, was that talked of at the informal meeting on Sunday which you testified about?

128 A. The proper manner by resolution or of the rejection of this appraisalment was spoken of.

Q. Who spoke of it?

A. I don't know of any one in particular.

Q. Was it talked of generally?

A. Generally, I should say.

Q. Everybody expressed themselves about that pretty freely, didn't they?

A. Yes, I don't think they were reserved on the subject.

Q. Not as reserved as you would have been at a formal meeting?

A. Possibly.

Q. Well, after you had all expressed yourselves in the free manner which you have spoken of, was it agreed that Mr. Webster and Mr. Wright should throw your views into the form of a resolution which should be written?

A. I think that we asked the learned gentlemen to formulate this conclusion as nearly as possible.

Q. It was in pursuance to that informal gathering and expression and request that Exhibit "3" was drawn, wasn't it, Mr. Barlow?

A. Say that over again.

Q. Read it to him (Question read)?

A. Yes.

Q. Was it drawn that day of the informal meeting or had your expressions taken so long that it had to go over until Monday to draw it?

A. I think that it would require some little time to formulate this, and a reasonable length of time given for that purpose.

Q. Well, what would you say, would you say that it was drawn that Sunday?

A. No, I would not say just when it was drawn.

Q. It may have been drawn Sunday, then?

A. I don't think it was.

Q. Will you be sure of that?

A. No.

Q. In view of the facts which you have detailed now, you would not claim that you were wholly uninformed about this appraisement on Monday when Mr. Woodbury saw you, would you?

A. I was not absolutely ignorant of the fact that the appraisers had been at work for some three years.

Q. And you were not entirely ignorant of the report, were you?

A. I had at least had an intimation.

Q. Do you know personally that this minute of the adjourned meeting is correct?

A. Yes, I think I can safely say that it is correct?

Q. How do you know it?

A. I was there and participated.

Q. Can you remember who were present at that meeting?

A. I do.

129 Q. Who were present?

A. Mr. Howell, Mr. Hipple, Mr. Coad, Mr. Congdon and myself.

Q. That was the full board?

A. Yes sir.

Q. Everybody was there?

A. The full board was there.

Q. I think you said that Mr. Hipple was not present at the informal meeting that you had Sunday, am I right about that, there was one member you said was not present, as I remember?

A. I don't think I said that.

Q. Well, maybe I misunderstood you.

A. Yes, I think I did.

Q. Well, then, to make it clear, were all the members present at that informal meeting at Mr. Webster's office?

A. I don't remember whether they were or not.

Q. What would you say then, was Mr. Coad there?

A. I think Mr. Coad was there; I think Mr. Congdon was there; I think Mr. Howell was there, and I think Mr. Hipple was there.

Q. Well, then, you were all there then?

A. I think we were, I would not say positively whether they were or not.

Q. But your memory is that they were all there?

A. Yes sir, my memory is that they were all there.

Q. Now, was it at the meeting of July 3, 1906, that Mr. Wright was sent to Chicago?

A. I don't remember.

Q. It was the meeting just before this one that was held on July 9, wasn't it?

A. I don't remember that it was at a meeting at all that Mr. Wright was called upon to go, it might have been an informal meeting or might have been by seeing the members individually so if there was a regular meeting or an informal meeting that concluded that, I don't remember.

Witness excused.

The further taking of testimony was here adjourned to 10 o'clock A. M., December 28th, 1906.

10 o'clock A. M., December 28th, 1906, Pursuant to adjournment, the following proceedings were had:

By Mr. WEBSTER: The defendant offers in evidence copy of the letter transmitted by Mr. C. C. Wright as attorney for the Water Board to Daniel W. Mead, chairman of the Board of Appraisers, protesting against the appraisers examining the books of the Water Company unless the city shall be permitted to be present and examine with reference thereto.

By Mr. HALL: You just offer it by itself?

130 By Mr. WEBSTER: Yes, because the only thing that I could do would be to call Mr. Wright to prove that that was a copy and he was called out to attend to another matter, but I personally know it is myself, because I dictated that letter.

By Mr. HALL: Well, but haven't you got to prove the receipt of it?

By Mr. WEBSTER: Well, I proved that by Mr. Fairfield, that Daniel W. Mead had it and showed it to him, a letter of protest.

By Mr. HALL: Well, I don't know whether they are the same or not.

By Mr. WEBSTER: I know that that is the one and the only one that was sent; I know all about it except that I did not deliver it in the mail, Mr. Wright did that.

By Mr. HALL: The offer is objected to as incompetent, and also because there is no testimony to show that the letter which is here exhibited is the same as the letter that was transmitted to the Board of Appraisers, if any such letter was transmitted and there is nothing to show that this is a true copy of the letter transmitted or that there were not other letters transmitted.

By Mr. WEBSTER: Defendant's counsel states that he will supplement this offer by the testimony of Mr. C. C. Wright to the point that said letters offered in evidence is a true and correct copy of the original and the only letter sent to Daniel W. Meade on that subject.

By Mr. HALL: Counsel renews the objection even with the addition of statement of counsel because the proof should be of the letters which was received by the Water Board if any such letter was received.

By Mr. WEBSTER: I ask the examiner having marked the letter as Exhibit "5," to take a copy thereof to be inserted in the record and that the original letter should be returned to the custody of defendant's counsel.

Mr. FAIRFIELD, recalled on behalf of defendant.

Examined by Mr. WEBSTER:

Q. Mr. Fairfield, you are familiar with the different packing houses in South Omaha?

in South Omaha?

A. More or less.

Q. Are you prepared to state the amount of water that is furnished by the Omaha Water Company to the respective packing houses in South Omaha during any specific period of time?

A. Not to the respective packing houses, I have the total
131 delivery to the entire service there which includes the Stock
Yards and the packing houses together.

Q. You may then state that?

A. Our records show that in the month of July, 1906, there were
144,088,750 gallons delivered through that 30-inch service.

Q. You say that was in July?

A. In July yes, which includes the stock yards and the several
packing houses; then during the month of November, 1906, there
were 148,273,250 gallons delivered.

Q. Are those estimates arrived at by the meter measurements for
the periods of time stated?

A. Yes sir.

Q. The amounts above stated do not include water furnished to
the city of South Omaha or the inhabitants thereof?

A. No sir.

Q. Have you any way of measuring or actually determining the
amount of water supplied to the City of South Omaha and the in-
habitants thereof?

A. No sir, they are supplied through the same portion of the dis-
tributing system that supplies all the high service district.

Q. What is the estimated population of South Omaha?

A. I do not know.

By Mr. HALL:

Q. Well, as near as you can is what he means?

A. Oh, I guess about 25,000. That would not furnish an index as
to their consumption of water, however, as compared with the popu-
lation of Omaha, for the reason that outside of the Stockyards and
Packing Houses there are practically no large consumers of water.

Q. Can you state the number of fire hydrants in South Omaha?

A. Approximately; there are about 250 I think.

Q. The rental from fire hydrants in South Omaha is the same
price, isn't it, that it is in Omaha?

A. Yes, sir, \$60 a year, and \$10 a year for intermediate hydrants.

Q. Was there any particular reason, for taking July and Novem-
ber as the basis of the amount of water supplied to the packing-houses
and the stockyards or was that simply taken as representing a fair
average for the year?

A. Neither, I followed the suggestion of Mr. Wright, he asked for
those two months.

Q. And what would you say as to whether taking these two months
would represent the general average for the year?

A. I could not say off-hand, I think they are above the aver-
age.

132 Q. Why do you think that?

A. Well, for the reason that July consumption is usually
the largest.

Q. And would that be true about the November?

A. I notice that the November consumption is somewhat larger
than July, which is unusual; that, however, is due to such conditions

of the livestock trade as might differ from year to year. You might get more livestock in November even than in July.

By Mr. HALL: The November market is a large market, that is the reason Mr. Wright picked out these two months.

By Mr. WEBSTER: Well, I don't want to put you to any extra trouble, but the way you have answered here it might appear as if these two months might be highly excessive and not a fair average.

By Mr. HALL: Well, they are the ones you asked for.

By Mr. WEBSTER: Well, I don't know why he did that.

By Mr. HALL: Well, I know why he did it, and I guess you could guess; why don't you ask him what the average consumption is?

By Mr. WEBSTER:

Q. Do you know what is the average consumption of water by the packing houses and stock yards for the year?

A. Yes, approximately.

Q. State what it is?

A. It ranges from four to four and one-half million gallons a day, sometimes runs as low as 3,000,000. It varies all the way from 90,000,000 gallons a month to 150,000,000 gallons or more.

Q. Have you any way of knowing the total amount of water pumped by the Water Company per day?

A. Well, I could give that approximately.

Q. You may state?

A. About, well, I would preface that by stating that it is not the total amount of water pumped, but the total amount of high service water delivered in the city which would be the index to the consumption. For the past year it has run about 16,000,000 gallons a day.

By Mr. HALL: Is that question limited to the present year, if it is, I shall object to it, I don't know whether you mean to limit it, or not?

By Mr. WEBSTER: Read the question. (Question read).

By Mr. HALL: You better make the answer cover the question.

133 A. Well, I can say further that for the past eight or ten years the average daily delivery of water through our distribution system has run between 14,000,000 and 16,000,000 gallons per day, the amount has varied between quite narrow limits during that period, pumping about the same now as we did half a dozen years ago.

Q. That includes the water that goes into the distribution system for the City of Florence and Dundee and East Omaha and South Omaha as well as the city of Omaha proper?

A. Yes sir.

Cross-examination.

By Mr. HALL:

Q. Mr. Fairfield, when you speak of this consumption of water for the past ten years, you speak of it in a general way, do you not?

A. Yes, I have the exact figures.

Q. Were you here so you knew the population of Omaha in 1880?

A. Yes.

Q. What was the population at that time?

A. According to the census it was about 30,000, I should say that was about right according to my recollection.

Q. Now, the town at that time was a growing town?

A. Yes.

Q. And the consumption of water grew with it of course?

A. Naturally.

Q. You don't know what the consumption was during the first ten years of the water business as compared with the last ten years?

A. No, I can say from recollection what it was in 1885 according to the records.

Q. What was it in 1885?

A. About three and one-half million gallons a day.

Q. These packing houses that you have been asked about are in South Omaha?

A. Yes.

Q. What position does South Omaha occupy with reference to Omaha?

A. Their boundaries are concurrent.

Q. South Omaha adjoins on the south?

A. The towns are practically one town.

Q. So far as the streets and all that are concerned, they are separated by an imaginary line?

A. That is all.

Q. The industries of South Omaha are the industries which build up and make Omaha are they not?

By Mr. WRIGHT: Objected to as a conclusion to a large extent.

Q. Do you know of the way in which the City of South
134 Omaha was built up and the consumption of water about which you have been asked about?

A. Somewhat, yes.

Q. I wish you would state how that was, covering the first ten years of the Water Company as well as the last ten years, about which you have been questioned?

A. Well, the growth of South Omaha of course, was gradual, beginning with about 1884 or '85 when the stockyards was started there, a small institution of course, at first, small packing houses were added from time to time which grew as the market grew, the town built up about the industries, it has been a gradual development of the stockyards and packing house industry there which involved a gradual development of the population.

Q. When was South Omaha incorporated?

A. I don't know, I have only a very general idea of that, it was somewhere from '86 to '88 along in there somewhere. Grew up down there like any suburb I should say.

Q. The pipes of the Omaha Water Company in making the domestic connections go right down the streets of South Omaha from the streets of Omaha as if there were no boundary line at all?

A. Yes; some of the first lines that were put in within the limits of South Omaha were ordered by the city council—

By Mr. WRIGHT: Move to strike out as a conclusion and not the best evidence and not a matter within his personal knowledge, he does not know anything about that.

By Mr. HALL: Yes, he does, he is your witness but I am going to protect him from your unjust aspersions, Mr. Wright.

A. —the pipes put in down there were merely continuations of the Omaha pipes.

By Mr. WRIGHT: Object also that it is not responsive to the question.

Q. Since the beginning of the Water Works plant, what have you to say about the growth of the city and the development and increase of the consumption of water?

A. In Omaha?

Q. Yes.

A. The population has grown continuously, I should think, since 1880, somewhat more rapidly in the last three or four years with relation to the Waterworks, that is more services have been added per year during the last three or four than at any other period.

Q. Well, could you give any relative idea of the consumption of water during the first ten years as compared with the consumption of water or the delivery of water the last ten?

135 A. I should say the average of the last ten years was about two and one-half times as much as the average of the first ten years.

Q. That is a matter of population, isn't it, speaking generally?

A. Speaking generally, it is, yes sir.

By Mr. HALL: Mr. Wright, did you find that telegram?

By Mr. WRIGHT: No, I could not find it, I do not know what became of it.

By Mr. WEBSTER: I wish to examine you, Mr. Wright, on the subject of this letter.

By Mr. HALL: Complainant will admit that Mr. Wright will swear that the letter which was offered here was a copy of the letter which he transmitted and that it was the only letter that Mr. Wright transmitted to Daniel W. Mead, but counsel still insists that the copy is not evidence and that the original must be produced and accounted for.

By Mr. WEBSTER: Defendants offer in evidence to be used upon the hearing in this case, the following depositions heretofore taken in a suit pending in the United States Circuit Court for the District of Nebraska, Docket "W" No. 209, wherein the Water Board of the City of Omaha, and the City of Omaha were complainants and Daniel W. Mead, John W. Alvord, George H. Benzenberg and the Omaha Water Company were defendants, to-wit: the depositions of W. W. Hartley, John L. Webster, Andrew Rosewater and C. O. Lobeck, with the exhibits attached thereto and filed in said cause on the 3rd day of February, 1906.

By Mr. HALL: That is objected to as incompetent, irrelevant and immaterial, not referring to any matter at issue here or competent to be considered here.

Witness excused.

By Mr. WEBSTER: It is further stipulated between the parties that Cooke's report, Ordinance No. 423, Amendatory Ordinance No. 430, and such other of the Ordinances heretofore offered in evidence as are printed in Connell's Compiled Ordinances of the City of Omaha of 1890, may be read in evidence from the said printed volume and need not be copied at length into the testimony; that in case of an appeal being sued out by either party that then the same may be transcribed into the bill of exceptions.

It is also stipulated that the same agreement shall apply to all ordinances offered in this case, and that the same may be read either from printed compilations or from a certified transcript.

136 By Mr. HALL: It is further stipulated that Ordinance No. 469, the Order of Council appointing appraisers and Notice of the Water Company appointing their appraiser may be considered and read in evidence and need not be copied at length into this record.

JANUARY 30, 1907—at 10 o'clock A. M.

Parties met at Room 430 Omaha National Bank Building, the plaintiff being represented by its solicitor, R. S. Hall, and the defendant being represented by its solicitors, John L. Webster and Carl C. Wright, whereupon the following proceedings were had:

E. M. FAIRFIELD, a witness produced on behalf of the plaintiff, having been previously sworn, testified as follows:

Examined in Chief.

By Mr. HALL:

Q. I will show you Exhibit 1-Z and ask you if you know what it is?

A. Yes sir, I am familiar with it.

Q. What is it?

A. It is a map of the entire system of Waterworks operated by the Omaha Water Company.

Q. Is it correct?

A. It is.

Q. I notice it is marked January, 1903, I presume there have been some additions made since that time?

A. It was complete at that time; there have been some additions made since then,

Q. To what extent have any additions been made?

A. There have been several lines of 200 feet each put in in various parts of town, I could not put my finger on the places, at a guess, perhaps two or three miles of mains have been added since that time.

Q. With the exception of those additions, it is correct, isn't it?

A. Yes sir.

By Mr. HALL: I will offer the map in evidence, and will put a copy in the record.

Same is received, marked Exhibit 1-Z, and hereto attached and made a part of this record.

Q. Can you show me on the map what indicates the line of separating or marking the city limits between Omaha and South Omaha?

A. Yes sir.

Q. Where is that line on this map?

A. It is a somewhat irregular dotted line running in general from east to west, marked "city limits" on the north, about one-fourth of the length of the map from the bottom from the south end of it, I should judge.

137 Q. The country to the south of that with the exception of Clontarf Precinct is South Omaha, is it not?

A. South Omaha, yes.

Q. Can you show me the line separating Dundee from Omaha?

A. Yes sir, it is the dotted line on the left hand or west side of the map marked Forty-eighth street and also marked "City Limits."

Q. Can you show me the line separating Omaha from Florence?

A. Yes, sir, it is the east and west line near the top of the map marked "City limits."

Q. There is no boundary or dividing monument or river or anything of that sort separating Omaha from Florence, Dundee and South Omaha except the theoretical lines which you have indicated?

A. That is all.

Q. In what way are the sizes of the pipes indicated on this map?

A. Marked in figures.

Q. In what way are the hydrants marked?

A. The hydrants are marked by drawing round dots, but they are not all shown on this map. On the north end of the map the hydrants are shown, but it was decided after the map had been partially completed that it filled it up too much to show all the hydrants.

Q. The line running across it from northwest to southeast marked in yellow against a white line represents what?

A. Dividing line between the high service and low service; that is the portion supplied by the Walnut Hill pumps as distinguished from the other portions.

Q. The two little squares inside of another square, and bordering on the street marked Hamilton represent what?

A. The Walnut Hill reservoirs.

Q. And where do you find the settling basins and intake of the system, in what way are they indicated?

A. The Florence settling basins and intake are shown at the top or north end of this map by diagrams.

Q. And how is the Burt street station indicated?

A. It is shown by some small diagrams at the intersection of the Missouri River with Burt Street, marked "River Station."

Q. You may state, Mr. Fairchild, what is the fact with reference to Omaha, South Omaha, Dundee, Florence and Omaha being one community or not.

By Mr. WRIGHT: Objected to as immaterial, calling for the conclusion of the witness.

A. All of these places have grown up as suburbs of Omaha, except Florence.

138 By Mr. WRIGHT: Move to strike out as being conclusion of the witness and not responsive.

A. I know this of my own knowledge.

Q. You may state what the fact is with reference to a movement being under way at present to annex South Omaha to Omaha.

By Mr. WRIGHT: Objected to as incompetent and immaterial, not relating to the matter of the purchase of the plant.

A. I know there is such a movement on foot to consolidate Omaha and South Omaha.

Q. How far has that movement gone?

By Mr. WRIGHT: Objected to as immaterial.

A. To the extent of the introduction of a bill into the Legislature, as I understand, providing for the annexation of South Omaha, to Omaha.

Q. You may state who that bill was prepared by, if you know, do you know who prepared it?

A. I do not.

Cross-examination.

By Mr. WRIGHT:

Q. This map to which your attention has been this morning directed, Exhibit 1-Z was substantially correct at the date of March 2nd, 1903?

A. Yes sir.

Q. Do you know what was the north limits of the City of Omaha as compared with the present north limits of the city, in 1880?

A. No, I don't know exactly.

Q. Do you know where the south limits of the City of Omaha was in 1880?

A. Not exactly, no.

Q. You have marked on this map, also on the right side or end what is city limits?

A. Yes sir.

Q. And there is a line of pipe marked on this map extending east?

A. Yes sir.

Q. That pipe is the pipe described as going to East Omaha?

A. Yes, sir, running east from the city limits.

Q. And part of that pipe lies in the State of Iowa, does it not?

A. I don't know.

Q. Don't you know where the boundary line is between the state of Nebraska and Iowa?

A. No, there is an irregular triangular shaped piece in there, but I don't know whether we cross it or not.

Q. Don't you know that that crosses a part of it?

A. Why I think we do, but am not positive of it.

Q. Now, the City of Florence, you say, has grown up as a suburb of Omaha?

A. No sir.

139 Q. You were asked as to all these places, Florence, Dundee and South Omaha?

A. I excepted Florence.

Q. Florence was established as a city long before Omaha was, wasn't it?

By Mr. HALL: Object to that, I don't think that is so.

A. Well, sometime before, I don't know how long.

Q. Now, Mr. Fairfield, South Omaha was first settled at what time?

A. 1884, I think.

Q. And the settlement was commenced down at about where the stock yards now are, as shown by—

By Mr. HALL: What do you mean by South Omaha being settled, Mr. Wright, South Omaha was not in existence in 1884.

A. It commenced to be settled in 1884, or thereabouts.

Q. About where the Union Stock Yards are now located?

A. Yes sir.

Q. At that time there was no street cars running down there, were there, south of the city limits?

A. No.

Q. There were no streets running down, but a country road?

A. That is all, I believe.

Q. And an independent industry of stock yards and packing houses was established there at that time?

A. Yes, by Omaha people.

Q. By capitalists from Omaha?

A. Yes sir.

Q. And it is built up now to be a city of some 30,000 or 35,000 inhabitants?

A. Well, I should say twenty-five to thirty-five.

Q. With a city government of its own?

A. Yes sir.

Redirect examination.

By Mr. HALL:

Q. The street cars that Mr. Wright speaks about run right through from city to city on the same streets, don't they, at present?

A. Yes sir.

Q. When you speak about South Omaha being settled in 1884, you do not mean that the country was unsettled before that?

A. I mean it was changed from farm land to other uses.

Q. Did that company come in there as early as 1883, and commence laying that off?

A. My recollection is it was in 1884.

Recross-examination.

By Mr. WRIGHT:

Q. Mr. Fairfield, the stock yards company had a water works system of their own, didn't they?

140 A. Not at that time in 1884.

Q. But they did later, didn't they?

A. They had one in course of construction, but I think it was never completed.

Q. They had a stand pipe, didn't they?

A. Yes.

Q. And planned to construct a water works of their own?

By Mr. HALL: Object to that as not proper cross-examination.

Q. The Omaha Water Company, or its predecessors, made some arrangement to purchase their plant from them and supply them with water, is that true?

By Mr. HALL: Object to that as not proper cross-examination.

A. Yes sir.

Q. The way, then, that the Omaha Water Company, or its predecessors came to go into South Omaha, was to supply the stock yards and packing industries there by reason of an arrangement with the Stock Yards Company, wasn't it?

By Mr. HALL: Object to that as not proper cross-examination.

A. I believe so, yes.

Redirect examination.

By Mr. HALL:

Q. Do you know that the City of South Omaha ever had any water plant?

A. Never did have any so far as I know.

Q. This plant that Mr. Wright speaks about was one operated in connection with the packing houses there, wasn't it?

A. It was projected by the Stock Yards Company for their own supply.

Recross-examination.

By Mr. WRIGHT:

Q. This map which you identify as Exhibit 1-Z was one of the maps which was presented to the engineers appraising the plant?

A. Yes sir.

Q. At that time the Water Company refused to make any separate statement of the amount of pipe in South Omaha?

A. I think not.

Q. Didn't it refuse to give a separate statement of the amount of pipe that was in South Omaha?

141 By Mr. HALL: Objected to as not proper cross-examination and counsel is warned that he makes the witness his own.

A. That is not my recollection of the circumstances, this map was put in to the appraisers and speaks for itself.

Q. And did it give any separate details or computation of the amount of pipe that was in South Omaha or in the adjacent municipalities, the water company declined to do that, didn't they?

By Mr. HALL: Objected to as not proper cross-examination and counsel is warned that he makes the witness his own.

A. No sir.

Q. Weren't they requested to do so?

A. They did furnish it.

Q. Under separate detailed statements just what was in South Omaha and Omaha?

A. Yes sir.

Q. Do you remember the number of exhibits?

A. No, I do not. I know the information was furnished however.

Q. By the Water Company?

A. Yes sir.

Q. It should be shown, then, by one of their schedules or exhibits, wouldn't it?

A. Yes.

Q. I wish you would produce that.

By Mr. HALL: You can call him on that yourself

Q. Do you refuse to produce that exhibit as a part of your cross-examination?

A. No sir.

Q. Will you do so?

A. Why I think so if I can dig it up.

By Mr. WRIGHT: I ask to have it attached to this exhibit 1-Z, as a part of this examination.

By Mr. HALL:

Q. Isn't it true that that map right there will show the quantity of pipe and amount and the whole thing if they will just figure it up themselves?

A. Yes sir, substantially.

Q. Do you know any reason that calls upon you to furnish the amount of the pipe to the city when all they have to do is to figure it up from the exhibit?

A. I do not see any sufficient reason, no.

By Mr. HALL: It is hereby stipulated and agreed that the records in the suit brought by the Farmers Loan & Trust Company against the American Water Works Company, et al., being Docket — No. —, for foreclosure of the mortgage against the American Water Works Company, and also the records in the case of the City of Omaha against the Farmers Loan & Trust Company and the Omaha
142 Water Company, et al., may be considered as evidence in this case and may be read by either party so far as the same may be regarded as material, subject to any objections which may be made by either party at the time of the introduction in court.

By Mr. HALL: I will offer in evidence the certified copy of the bill in equity of the Water Board of the City of Omaha, and the City of Omaha vs. Daniel W. Mead, John W. Alvord, G. H. Benzenberg and the Omaha Water Company, being Docket "W" No. 209.

By Mr. WRIGHT: Objected to as incompetent, irrelevant and immaterial.

By Mr. HALL: I will offer in evidence the resolution duly certified of the Omaha Water Company authorizing the president to execute and tender to the city a deed, same being marked Exhibit ZZ-2, copy being hereto attached and made a part hereof.

By Mr. WRIGHT: Objected to as incompetent, irrelevant and immaterial, and no proper foundation being laid for the same, no objection being made that the paper presented is a copy of the certified record, waiving any objection to the proof of the genuineness of the signatures to the certified copy.

The witness excused.

R. S. HALL, being first duly sworn, testified as follows:

I will state that I was present when Mr. Woodbury tendered the deed, Exhibit ZZ to the Mayor of the City of Omaha, and to Mr. Barlow, Chairman of the Water Board, and I was present when the deed was executed in my office.

By Mr. HALL: I will offer this deed in evidence subject to proof by the subscribing witness if you desire it, marked "ZZ," and I will furnish a copy of this deed and also a copy of the resolution of the Board of Directors.

This paper, "ZZ" is the deed that was tendered by Mr. Woodbury to the Mayor and to the Chairman of the Water Board.

CARL C. WRIGHT, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. HALL:

Q. Were you consulted with reference to the bill which was sent from Omaha down to the legislature, known as the Breen Bill, providing for the annexation of South Omaha?

143 Q. Did you talk it over with Mr. Breen at all?

A. No sir, never mentioned it at all.

Q. Have you talked over any bill with him?

A. No sir, not any bill.

Q. Have you talked over with anybody any bill of the annexation of Omaha and South Omaha?

A. No sir, except possibly on the street people may have asked me if I knew what the bill was, but I have never seen it, it was just casual remarks on the street car or the street.

Q. Have you talked with Mr. Breen at any time?

A. No, I never have seen him since the bill——

Q. Well, but I mean at any time about the annexation of South Omaha?

A. I do not recollect ever having spoken to him on that question and within the last year, I know it has never been mentioned.

Q. Have you talked over any such bill in the meetings of the Water Board?

A. No sir.

Q. No bill for the annexation of South Omaha to Omaha?

A. No sir, none, with any members of the Board.

Q. When did you first hear of the Breen bill?

A. When I saw it in the paper. I heard in the newspapers last fall that it was planned by the legislature to annex South Omaha soon after the election, saw some note in the paper of that kind, but never discussed it with any member of the legislature or with Mr. Breen, or with anybody having anything to do with it.

Q. Hadn't you been asked prior to that to prepare a bill looking to the annexation of South Omaha?

A. No sir.

Q. Do you know who Mr. Breen has talked with in preparing it?

A. No sir, I never have mentioned a thing to Mr. Breen, don't know a thing.

Q. Mr. Breen is the Breen who was formerly city attorney of Omaha?

A. Yes sir.

Q. And appeared for the city in the litigation between the Water Company and the City?

A. He did, during the period in which he was city attorney.

Q. And during that time Mr. Breen consulted with you with reference to the litigation, didn't he?

A. Yes, some.

Q. Did he also consult the Water Board?

A. Not to my knowledge.

Q. Wasn't he present at any of your meetings?

A. Not that I remember, might be possible that he was.

Q. Will you say he was not?

144 A. I would not say he was not present at some meeting, but I never remember of his being present, and I do not think he was.

The witness excused.

JOHN L. WEBSTER, being first duly sworn, testified as follows:

Examination-in-Chief.

By Mr. HALL:

Q. Mr. Webster, have you seen the bill which was prepared for the annexation of South Omaha to Omaha, and which is known as the Breen Bill?

A. I have not.

Q. When did you first hear of the Bill?

A. I have never heard of it.

Q. You mean to say that you have not heard anything about the Breen bill which has been printed in all the papers in this town?

A. If it has ever been printed, I have never seen it.

Q. And you have never heard anything about the question of annexation which is being agitated now?

A. I have never heard anything about it.

The witness excused.

Adjournment was here taken to 10 o'clock A. M. January 31, 1907.

January 31, 1907, 10 o'clock A. M., Parties appeared by their respective counsel and the following proceedings were had:

By Mr. HALL: Mr. Fairfield appears and states that he has the schedule which Mr. Wright asked for yesterday, marked Exhibit "A-1100-E," which Mr. Wright does not now care to have attached.

PAUL E. MARTIN, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. HALL:

Q. Mr. Martin, I show you exhibit ZZ, being a deed from the Omaha Water Company to the City of Omaha, do you remember that paper?

A. I do.

Q. Turn to the clause showing execution and acknowledgment of that deed, whose signature is that as the witness to that deed?

A. Mine.

Q. Was that deed executed before you?

A. It was.

Q. At what place?

145 A. At the office of the Omaha Water Company in the City of Omaha.

Q. Do you know Mr. Woodbury, the president of the Omaha Water Company?

A. I do.

Q. Did he sign that in your presence at the time it bears date?

A. He did.

The witness excused.

Adjournment was here taken to February 26th, 1907, at 11 o'clock A. M.

FEBRUARY 26, 1907—at 11 o'clock A. M.

Pursuant to adjournment, the following proceedings were had:

FRANCIS H. MARSHALL, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. HALL:

Q. What is your position?

A. Engineer of the Omaha Water Company.

Q. How long have you been connected with that company?

A. Since 1889.

Q. Were you present when the works were being built at Florence?

A. Yes sir.

Q. Did you assist in that work out there?

A. I did.

Q. Were you present during the preparation of the maps and plans which represent the Company's claims before the appraisers?

A. Yes sir.

Q. Have you those maps and plans here?

A. Yes sir.

Q. Are the maps and plans contained in these four books?

A. Those are the maps that we compiled for the appraisalment, yes sir.

Q. And the ones that were presented to the appraisers?

A. Yes sir.

Q. You may state, Mr. Marshall, what the course of the appraisalment was, what was done with reference to the city when the map was prepared?

A. The maps were prepared from our——

Q. Never mind what they were prepared from now, but what was done with them after they were prepared?

A. The blue prints were taken from them and one set was given to the appraisers and one to the city.

Q. These are the ones from which the copies were taken, one of which was given to the appraisers and one of which was given to the city, are they?

A. Yes sir.

146 Q. You assisted in preparing these?

A. Yes sir.

Q. You know them to be the correct ones that were presented to the appraisers?

A. Yes sir.

By Mr. HALL: The plaintiff offers in evidence these four books, for the purpose of showing the course of the appraisalment. Said exhibits are marked respectively, 2-Z, 3-Z, 4-Z, and 5-Z, and are made a part of this record.

By Mr. HALL: Counsel here gives notice that he will produce these books on the hearing.

By Mr. WEBSTER: The defendant objects to the offer and the receiving in evidence of the books, being the exhibits last above referred to, as being incompetent, irrelevant and immaterial under the issues in this case. Second, that it is improper to introduce on this hearing evidence that may have been presented to the board of appraisers.

No cross examination.

Witness excused.

STOCKTON B. HETH, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. HALL:

Q. What is your position?

A. Treasurer.

Q. Of the Omaha Water Company?

A. Yes sir.

Q. Do you know, Mr. Heth, how much the appraisement cost the Omaha Water Company, how much they paid for the work on it?

A. Yes sir.

Q. How much was it?

By Mr. WRIGHT: Objected to as immaterial and incompetent.

A. \$26,959.09.

Q. Do you know how many days' work you paid for the appraisers?

A. Yes sir.

Q. How many?

A. Ninety-Seven.

Q. That was to Mr. Benzenberg and Mr. Mead?

A. Yes sir.

Cross-examination.

By Mr. WEBSTER:

Q. Have you got a statement that will show the expenditures you have made, that you have referred to?

A. Yes sir.

Q. Have you got it with you?

A. I can get it, yes sir.

Q. Will you please let me see it?

147 A. That is in detail.

By Mr. HALL:

Q. Have you got one made out, Stockton?

A. Yes sir.

Q. Well, then get it.

(Witness produces statement.)

By Mr. WEBSTER: The defendants offer in evidence the statement produced by the witness, which statement was marked Exhibit "6", and copy of same is hereto attached and made a part of this record.

Redirect examination.

By Mr. HALL:

Q. Mr. Heth, that does not include any items of legal expenses at all does it?

A. No sir.

Q. I notice a little item there to Lord, Day & White, that was not attorney fees at all to them was it?

A. No sir.

Q. Counsel fees would be added to that for expenses, would it not?

A. Yes sir.

Q. Mr. Hunt's time is not in there, either, is it?

A. No sir.

Q. You do not claim that covers all the items of expenditure, do you, Mr. Heth?

A. No sir.

Q. Or cost?

A. No sir.

Witness excused.

Further proceedings were here adjourned to 2 o'clock P. M. February 26, 1907.

2 o'clock P. M., February 26, 1907.

Pursuant to adjournment, the parties met at the office of John L. Webster, in the New York Life Building, and the following proceedings were had: The defendant being represented by its attorneys, John L. Webster and Carl C. Wright and the plaintiff by its attorney R. S. Hall.

By Mr. WEBSTER: The defendants offer in evidence the following documents:

First. The certified copy of the mortgage made by the City Water Works Company of Omaha to secure an issue of bonds of \$400,000 dated — and which certified copy of the said mortgage will be produced on the hearing.

Second. Mortgage of the Omaha Water Company to Guaranty Trust Company of New York, dated July 23, 1896, duly certified copy of which will be produced on the hearing.

Third. A consolidated mortgage of the Omaha Water Company to the Farmers Loan & Trust Company dated July 23rd, 1896, duly certified copy of which will be produced on the hearing.

By Mr. HALL: To all of these the plaintiff objects as incompetent, irrelevant and immaterial.

By Mr. WEBSTER: The defendant offers in evidence the notice from the American Water Works Company to the Union Stockyards Company of Omaha, dated January 3, 1907, giving notice of cancellation of contract to take effect July 10, 1907, copy of which is inserted in the record as Exhibit "7".

The defendant also offers in evidence a letter from the Water Company to W. J. C. Kenyon, General Manager for the Union Stock Yards Company under date of January 3, 1907, relating to said notice terminating said contract, a copy of which is inserted in the record as Exhibit "8".

By Mr. HALL: To which offers the plaintiff objects as incompetent, irrelevant and immaterial.

By Mr. WEBSTER: The defendant offers in evidence certified copies of the records relating to the voting of \$3,000,000 of bonds in the

year 1900 for the appropriation or purchase of water works as follows:

(1) Ordinance No. 4691, a certified copy of which is offered as Exhibit "9".

(2) The election proclamation pursuant to said ordinance, Exhibit "10". And

(3) A certified copy of the proceedings of the city council canvassing the vote and declaring the result, as Exhibit "11".

By Mr. HALL: To all of which the plaintiff objects as incompetent, irrelevant and immaterial, not within the issues and no tendency to prove or disprove any issue in this case.

C. C. WRIGHT a witness re-called on behalf of the defendants, having been previously sworn, testified as follows:

Examined in Chief.

By Mr. WEBSTER:

Q. If you know, you may so state what the facts are as to whether or not the City of Omaha has taken any steps to or voted any bonds for the acquisition or purchase of the Water Works since the voting of the \$3,000,000 of bonds in 1900, shown by the ordinance just introduced in evidence down to the present date?

By Mr. HALL: Plaintiffs object as immaterial, irrelevant,
149 not within the issues, not tending to prove or disprove any issues in this case and as not pleaded nor claimed by the city in its answer.

A. Oh, no, and there has been no bonds voted nor any action taken toward voting bonds since the ones referred to.

By Mr. WEBSTER: It is hereby stipulated that the books of the Omaha Water Company which were transmitted from Omaha to Cincinnati pursuant to the letter of Daniel W. Mead heretofore offered in evidence in connection with the testimony of Mr. Fairfield, were not submitted to the inspection or examination of Mr. C. C. Wright the attorney for the city or to any other person or attorney representing the city of Omaha at any time pending the said appraisalment proceedings.

By Mr. HALL: I am not willing to stipulate in as broad language as dictated by counsel, but I do agree that the Omaha Water Company declined to allow Mr. C. C. Wright to inspect its books or to allow the city to inspect the books, claiming that if the appraisers desired to inspect the books that the inspection by the appraisers was a sufficient representation for the city.

And I agree further that the board of appraisers did not submit the books to the inspection of Mr. C. C. Wright or any other person representing the City of Omaha except so far as the city might be said to be represented by Mr. Alvord, their appraiser.

ISAAC E. CONGDON, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. WEBSTER:

Q. Mr. Congdon, are you an attorney at law in the City of Omaha?

A. I am.

Q. And a member of the Water Board of the City of Omaha?

A. Yes sir.

Q. And were you such during the full period of the appraisalment from July 20, 1903 to June 7, 1906?

A. Yes sir.

Q. Were you present at the meeting of the board of appraisers on the 20th day of July, 1903, when the Board organized in the City of Omaha?

A. Yes, sir. I was present when the Board organized, I cannot say that I remember the date.

Q. And were you present from time to time when the open meetings of the Board of Appraisers were held in the city of Omaha from the date of its organization down until the closing of the taking of evidence and the oral argument of the attorneys in December, 1904?

A. I was present at all of the open sessions held by the appraisers here in Omaha with the exception of possibly one or two, but not continuously present at the holding of every session.

Q. At these respective sessions, what persons were present representing the Water Company?

A. Mr. Woodbury, the president of the Company; Mr. Richard S. Hall, counsel for the company; James M. Woolworth, counsel for the company; Mr. Mansfield of New York, I think was present at every session. I may be mistaken about Mansfield, but Mansfield was there on several occasions that I was there and on one occasion Mr. Underwood was present as counsel.

Q. Who were present at these meetings representing the City of Omaha?

A. Carl C. Wright, city attorney, and I think at almost every session James E. Boyd, chairman of the Water Board was present.

Q. You may state, Mr. Congdon, whether or not the respective parties formally introduced evidence before the Board of Appraisers by their respective attorneys at their different sessions?

By Mr. HALL: The plaintiff objects as calling for the conclusion of the witness and not the facts and as leading.

A. They did.

Q. State the manner in which the respective parties offered their evidence?

By Mr. HALL: The plaintiff objects as calling for the conclusion of the witness and not the facts and as leading.

A. Well, plats and blue prints, documentary evidence was presented and offered in evidence as they would be in court and witnesses were called and examined as they would be in court.

Q. Cross-examined?

A. Yes sir.

Q. These examinations of witnesses were conducted by whom?

A. The evidence for the Water Company was introduced, I refer to evidence in the shape of maps, plats and blue prints, generally by Mr. Hall and the witnesses were orally examined in behalf of the Water Company for the greater part by Mr. Hall, and cross-examined by Mr. Wright for the city, and the documentary evidence was presented for introduction through Mr. Wright representing the City, and the witnesses for the City were orally
151 examined by Mr. Wright, and cross-examined for the most part by Mr. Hall for the Water Company.

Q. Mr. Congdon, were you present at the time when the taking of testimony before the board of appraisers was concluded, in December, 1904?

A. I can't state positively, unless the arguments immediately followed, but I was present at the arguments.

Q. Were oral arguments made before the board of appraisers at the conclusion of the testimony?

A. Yes sir.

Q. And who made the oral arguments in behalf of the Water Company?

A. Mr. Hall, Mr. Mansfield, Mr. Woolworth and Mr. Underwood, is my recollection.

Q. Who made the oral arguments, before the board of appraisers in behalf of the City of Omaha?

A. Mr. Wright; and I think Andrew Rosewater, city engineer of the City of Omaha, had something to say.

Q. State if you know whether printed briefs were presented to the board of appraisers by the attorneys for the respective parties, and if so, by whom?

A. My recollection is that Mr. Wright had his brief printed and handed it in. I afterwards saw the brief of the water company, but I do not remember distinctly whether they were there in printed form at that time or not.

Q. Who was the water company brief signed by?

A. They afterwards came in, by Mansfield, I think, I afterwards saw a brief that I think was written by Mr. Mansfield or possibly some other attorneys, I don't distinctly remember as to that.

Q. At the time of the conclusion of these arguments before the board of appraisers, what was the fact if you know as to what announcement, if any, the board of appraisers made as to whether or not it would take the matter under advisement or consideration?

By Mr. HALL: The plaintiff objects to the question as leading and suggestive.

A. My memory is that Mr. Mead, the chairman of the appraisers, made an announcement that the appraisers would take the matter into consideration, and intimated that it might be a matter of considerable time, using the expression, as I now recollect, it would not be a matter of days, it might be a matter of months, as I recollect it.

Q. Well, the time before reaching a conclusion, you haven't said what?

152 By Mr. HALL: The plaintiff objects to the question as leading and suggestive and because the counsel is fully competent to tell the facts about that without having them put in his mouth.

A. (The last above answer was here read to the witness by the reporter, to which he made the following addition:) Before an award would be made.

Cross-examination.

By Mr. HALL:

Q. Mr. Congdon, you spoke of those present at the meetings representing the two parties, Mr. Woolworth, Mr. Woodbury, Mr. Mansfield, Mr. Underwood, once, and Mr. Hall, as appearing from time to time in behalf of the Water Company?

A. Yes sir.

Q. What do you mean by appearing?

A. Sitting on one side of the table and representing the Water Company as counsel would ordinarily represent a client in a court.

Q. Do you mean that Mr. Underwood represented the Water Company as counsel would ordinarily do?

A. No, I would not so understand, he was there as president of the company, I suppose.

Q. Now isn't it true Mr. Congdon that a good many people spoke in that case on both sides from time to time as the proceedings went on, particularly in the opening of that matter?

A. Yes sir.

Q. Did not Mr. Rosewater make a talk for the city in the opening, the city engineer?

A. I do not remember, possibly he did.

Q. Didn't you from time to time make a little talk?

A. I think I spoke once, interjected some remark.

Q. Mr. Boyd, did, too, didn't he?

A. Possibly, but I do not remember, that he addressed the appraisers, he had a little talk in the nature of controversy with Mr. Woodbury once.

Q. Well, didn't he address the appraisers, too?

A. Well, possibly he did, Boyd made no address to the appraisers so far as I remember, he was present I think every time I was present and occasionally said something, so that of course the appraisers heard what he said.

Q. And occasionally he addressed the appraisers too, didn't he?

A. Not that I remember.

Q. Will you say he did not?

A. No.

Q. Now you have had put in your mouth, as I look at it, by Mr. Webster, as a very legal and formal statement by Mr. Mead, that he would take this under consideration. Do you undertake to say what the language was of Mr. Mead at that time?

A. Oh, no, I simply attempted to give my recollection generally of what was said as it impressed my mind.

Q. Isn't this the language that was used by Mr. Mead at that time: "In closing this session of the board, which by common consent of the parties to this appraisal, is to be regarded as to be the last on which formal evidence is to be presented, and after receiving and listening to the able arguments of counsel, the matter of this appraisal has been formally handed to this board, the board wish to call the attention of the parties to this appraisal, to the fact that while much work has been already done, that the work of valuation of this board as a board has only just commenced." Didn't Mr. Mead use that language at that time?

A. I presume he did, it sounds familiar to me.

Q. Did he not also say: "We have before us some thousand or more plats, diagrams, schedules, descriptive matter, some two thousand pages of evidence and the arguments of counsel. It becomes the duty of this Board now to examine in detail these various schedules, to weigh the evidence presented, to examine the arguments which have been forwarded and from this mass of matter to arrange a schedule on which a valuation can be made by the board. It is undoubtedly evident to all who have followed closely these proceedings, that this will involve a considerable labor; that undoubtedly much more information must be sought by the Board than that already presented;" did not Mr. Mead use that language at that time?

A. I would not say he did not, it sounds familiar to me.

Q. You think that was his statement?

A. He probably did.

Q. And did he not also say: "And that the board will undoubtedly wish to call upon the city and the company for special information as to details, the necessity for which will develop as the work proceeds?"

A. Possibly.

Q. Well, then he didn't say as Mr. Webster put in your mouth that they had taken this finally under consideration, did he?

A. Well, that was—my answer to Mr. Webster's question was a general answer, I did not attempt to remember his very words.

Q. Well, but Mr. Congdon, it was so general that if I had not corrected it, it might have given a very false impression to a court as to what Mr. Mead did say?

154 A. No, because I think from what you have read that my answer is entirely correct.

Q. Well, then you did not mean anything different from what I have read to you in making your answer to Mr. Webster?

A. No, when I said he took it under consideration I meant to say this, that my memory now from what he then said was that they were through with the formal sessions, and had taken hold of the work, I distinctly remember he had said something about it not being a matter of days but a matter of months.

Q. And you knew then that Mr. Mead announced that they were going on and further investigate this matter?

A. Well, not particularly, I presume they would take hold of it.

Q. You didn't misunderstand that?

A. Well, they would go through with the investigation when they——

Q. I will read it to you again from the reporter's notes, you recognize the report I hold in my hand?

A. I presume it is the stenographic report from the reporter's notes.

Q. I will read to you again: "That undoubtedly much more information must be sought by the board than that already presented?"

A. I have no doubt but what he said it.

Q. Then you did not mean by what you said to indicate that this was a closing of the investigation by the board of appraisals?

A. Oh, no, not to that extent, no.

Q. And in what you said in answer to Mr. Webster you did not mean, and you do not now mean to convey to the court that that was your understanding of what happened there that day, that it was closed and that the Board was not to get further information?

A. No I did not mean to answer you that way, that it was absolutely closed.

Q. You mean you did not mean to answer Mr. Webster that way?

A. Yes, I understood that they were through then with their formal examination, or with their sessions, if anything further come up I assumed there would be a further hearing.

Q. And that they would make just the examination that Mr. Mead said they would make?

A. I presumed they would do as he said.

Q. I call your attention to the further statement made by Mr. Mead found on page 28, and being a continuation of the
155 statements which I have read to you: "In this connection I wish especially to call your attention to the fact that this is not a work of days or of weeks, but of months." Did he not use that language?

A. Yes sir.

Q. "While the board will undoubtedly take this matter up as expeditiously as possible, it must be recognized that the members of this board have other demands upon their time besides that of this appraisal, and I speak these words simply to make clear the fact that we recognize that no immediate report can be made, and that no such immediate report must be expected in this connection?"

A. I recollect something of that kind.

Q. And did he not close with these words: "If there are no further matters to come before the board, the board will stand adjourned. I will say in this connection that the members of the board will probably remain in Omaha over Saturday in order to collect the various exhibits and prepare for other work?"

A. I have no doubt he said it, Mr. Hall; I have no particular recollection of that latter part.

Q. Mr. Congdon, isn't it true that at the opening of the session of the board of appraisers that Mr. C. C. Wright presented a plan to the appraisers, presented it in writing, outlining the way in which they should do their work?

A. I do not remember except in a general way, I have not had it called to my attention at all since.

Q. Wasn't it called to your attention at the time before it was presented to the appraisers?

A. I do not remember that it was, still I have an impression that there was something of that kind.

Q. Isn't it true that Mr. Wright prepared a written claim of that appraisal and presented it to the members of the Water Board for their investigation before it was presented to the board of appraisers?

A. No, I think not.

Q. Well, didn't he present it to the members of the Water Board?

A. I think not, no, he was city attorney at that time.

Q. Yes, I know, but he was working in conjunction with the Water Board?

A. Yes.

Q. Well, then do you mean to say that he prepared whatever plan he did prepare without consulting the Water Board at all?

A. I think so, he may have talked it over with me, he may have talked it over with Mahoney, we were both on the board then, I don't remember what it was, I might if I would see again.

Q. I will show you the printed book which contained the first days of the appraisal, do you recognize it?

156 A. No, I never saw it.

Q. Well, calling your attention to pages 3 and 4 of that book, where Mr. Wright prepares a written statement of how the matter should be conducted, I will ask you to look at that and state whether that recalls to your mind the statement which Mr. Wright prepared and showed to yourself and Mr. Mahoney?

A. I don't mean to say that he ever showed it to myself and Mr. Mahoney; Wright, Mahoney and myself had some general talks and I cannot say now that I ever saw this.

Q. Will you say you didn't?

A. No, I have no recollection of it.

Q. You were there at the first session of the board?

A. Yes sir.

Q. And you have been able to tell Mr. Webster most of the things that happened there, have you forgotten all about that?

A. I have no recollection of it.

Q. Would you forget as important a thing as that?

A. I evidently have, if I ever knew anything about it.

Q. Well, you were there?

A. I was there; I didn't stay through all these sessions, I was there at the opening of the board.

Q. But that was very early in the opening, wasn't it?

A. I presume it was.

Q. It was an important matter, wasn't the way in which the matter was to be done?

A. It may have been.

Q. The plan which the city proposed to have carried out was important wasn't it?

A. Oh, I presume it was in the consideration of the City Attorney.

Q. How does it happen that you forget such an important thing as that?

A. I had nothing to do with that whatever.

Q. But you have been asked to explain this, and you have remembered a good many matters that were very unimportant, to my notion, how do you explain the fact that you have forgotten such an important thing as this?

A. I never saw it that I remember of.

Q. Wasn't it read to the board in open session?

A. Not that I know of.

Q. Will you say that it was not?

A. I have no recollection of it if it was.

Q. I am speaking, Mr. Congdon, of the board of appraisers?

A. I have no recollection of that.

Q. Well, will you say that it was not read to them?

A. No, I will not say it was not read to them. I thought you meant the Water Committee, I have a vague recollection about it but nothing definite.

157 Q. Did not Mr. Wright in offering that to the board of appraisers, use this language, "As we are unable to agree in the method of procedure in this case", addressing himself to the appraisers, "I have here an outline, a plan of procedure, suggested on behalf of the city of Omaha, which, if agreeable, I will read to you and perhaps after I have submitted the written portion I will state to you somewhat more fully why we desire this method carried out and our ideas about it"?

A. I do not remember, he may have, I do not say that he did not.

Q. And did he not follow up that statement by reading just what he proposed to do in that statement?

A. I do not remember that.

Q. And did not Mr. Wright, after he had finished reading that to the board, turn to me and say, "Mr. Hall, have you outlined any plan?"

A. I do not remember, Mr. Hall.

Q. Will you say he did not?

A. No sir, I will not say he did not.

Q. And isn't it true that substantially the plan as recommended by Mr. Wright in writing was the plan adopted by the board?

A. I do not know, I would not say that, I have not read that through yet, let me read that.

Q. Well, I am asking as to your memory?

A. I have no memory on it.

Q. Well, now, I will hand you the book and let you look at the plan suggested by Mr. Wright which I have just called your attention to, and your memory being refreshed by an examination of that, what do you say?

(Question withdrawn.)

Q. Having examined the book containing the printed record of

this matter, have you any doubt that Mr. Wright made the plan which I have shown you, and made the statement to which your attention has been called?

A. Yes and no. I mean by that that I have no recollection of ever having seen the statement, copy of which is in this printed record that you have exhibited to me, but if it is in the record there I have no doubt that it was read there.

Q. You have no objection to answering my question just as I put it, have you?

A. No, so far as I can.

Q. I will repeat it then: having read this record which I have shown you, have you any doubt that that occurred just as I have read it to you, both as to the statement and as to Mr. Wright's remarks just preceding it?

A. I have no recollection of it.

Q. I am not asking you for your recollection, I am asking you if you have any doubt of it?

158 A. Personally I have no doubt of it, it appears in that printed record there, and being there I would have no doubt but what it occurred there.

Q. There were no expert witnesses called as to value by either side were there in that appraisalment?

A. Not that I recollect except I think I was there once when some witnesses on the value of real estate and one time when the price of stone was inquired into, but no witnesses were called in regard to the value of the plant, that I remember of.

Q. The prices of stone at certain time were shown?

A. Yes sir.

Q. And the value of real estate?

A. Yes, I think I have a recollection of seeing Harry Reed there.

Q. The only witnesses called on the value of real estate as experts were called by Mr. Wright?

A. I believe that is so.

Q. So Mr. Wright called as experts so far as any were called himself?

A. I think they were called by the city, that is, the real estate men.

Q. And that was in direct opposition to the plan which he had proposed, and the position which he had taken in the early part of the case?

A. Well, that is a matter of conclusion, he says something about that, I believe.

Q. Well, that is a fact, isn't it?

A. No, let me read what he says there (Witness reads from record).

Q. It is a fact, isn't it, Mr. Congdon, that Mr. Wright in his plan did propose that no expert witnesses should be called?

A. It appears to be there, from that statement, yes sir.

Q. And it is a fact within your knowledge that he was the only one who did call expert witnesses?

A. He called witnesses on real estate values.

Q. And as experts?

A. As experts.

Q. And those were the only ones——

A. The only ones that I recollect of.

Redirect examination.

By MR. WEBSTER:

Q. Was the testimony taken before the board of appraisers that you have referred to, at all times taken down by a stenographer?

A. The stenographers were always there taking the testimony, as I supposed.

159 The witness excused.

R. S. HALL, a witness produced in behalf of the plaintiff, having been duly sworn, testified as follows:

Examined by Mr. STOUT:

Q. Where do you reside?

A. Omaha.

Q. How long have you resided in that city?

A. Over twenty-five years.

Q. What is your business?

A. Attorney and counselor at law.

Q. How long have you been engaged in that profession in Omaha?

A. Since 1877.

Q. Have you ever been connected with the Omaha Water Company in the matter of the appraisalment of the Omaha Water Works plant?

A. I have been the attorney of the Omaha Water Company since 1896.

Q. And as such attorney, what connection or relation did you have with the appraisalment of the water works company plant in Omaha under the contract of purchase between the Water Works Company and the city?

A. I was present at all the hearings before the appraisers and put in nearly all the testimony, and plans and blue prints showing the claim of the Omaha Water Company and constituting its inventory of property.

Q. Did you have the exclusive charge of the hearing before the appraisers on behalf of the Omaha Water Company?

A. I don't know that I would say that I had the exclusive charge Mr. Woolworth and Mr. Mansfield were both——

Q. What I meant to ask was, if you have had the control or were one of those who were the leading counsel in that case?

A. I practically prepared the case, or you call it the case, I prepared the way of putting in the Company's inventory, which was what it amounted to.

Q. And you were so engaged throughout the entire time of the hearing?

A. Yes.

Q. And are familiar with what was presented to the appraisers, as well as the action of the appraisers throughout the appraisal or the hearing?

A. Yes.

Q. What length of time did the appraisers take in listening to the presentation made by the Water Company and in examination of the plant, if they made any?

A. Well, the appraisal ran over a long length of time, I cannot give the dates, but there were a number of hearings, they all appear in the record which is here, the record was kept
160 by stenographers who were paid by the city and by the Water Company, and who took the record by agreement.

Q. Have you the record as made up by the stenographers at the time the appraisal was made?

A. I have.

Q. Calling your attention to Volumes 1 to 4 and the printed volume which you say precedes it, marked for the purpose of identification Exhibit 6-Z, is that the stenographic report of the hearing before the board of appraisers?

A. It is a complete report I think in every respect, of the inventory and showing and the testimony which covers that inventory and showing, outlining the claims of the Omaha Water Company, as to its property, and such contentions as were made by the city.

Q. And this is complete so far as any hearing was had in the presence of the appraisers?

A. So far as the formal part of the testimony goes, it is, I think, absolutely complete. There may be in the printed volume, it may be there were some little errors, but substantially the record of the inventory and claims of the two sides are shown in the first volume, and it is absolutely shown in the other four volumes which were taken by stenographers.

By Mr. HALL: I offer these five volumes embracing the stenographic report of the hearing before the board of appraisers, marked exhibits 6-Z, 7-Z, 8-Z, 9-Z, 10-Z, in evidence, and will produce them on the hearing for such purposes as may be necessary to show the course and progress of the appraisal.

By Mr. WEBSTER: To which offer the defendants object as irrelevant, immaterial; (second) that it is incompetent to offer in this case the testimony in bulk which may have been received by the board of appraisers; (third) that the testimony taken before the board of appraisers is not material or relative to any issue in this case.

By Mr. STOUT: For the further identification of the records just offered, I will ask the stenographer to mark these separate volumes by her exhibit mark from 6-Z to 10-Z inclusive.

Q. Were there any other suggestions or plans upon which this appraisal proceeded than those you have suggested, Mr. Hall?

A. In the early part of this appraisal when we were first commencing of course the matter was very new to all of us, except

perhaps the appraisers, and Mr. Wright in answer to a request
 161 from the board of appraisers, proposed to them his plan of
 appraisal in writing. Before he produced that plan he
 addressed the board as follows, and I read from page 2 of the record,
 book 5.

By Mr. WEBSTER: Objected to as immaterial and already offered
 in evidence.

A. (Reading) "As we are unable to agree as to the method of
 procedure in this case, I have here an outline of the plan of pro-
 cedure suggested on behalf of the City of Omaha, and which if
 agreeable to you I will read to you, and perhaps after I have sub-
 mitted the written portion I will state to you somewhat more fully
 why we desire this method carried out and our ideas about it." He
 then read the following document:

"In the Matter of the Appraisal of the Omaha Water Works.

To the Honorable Board of Appraisers:

GENTLEMEN: In compliance with your request for an outline
 of the plan of procedure to be followed in the appraisal of the Omaha
 Water Works, on behalf of the City of Omaha I desire to suggest:

1. That this Board was appointed under the authority of and pur-
 suant to the provisions of section 14 of Ordinance No. 423, ap-
 proved June 11, 1880, said section being as follows:

SEC. 14. 'The City of Omaha shall have the right at any time
 after the expiration of twenty years to purchase the water works at
 an appraised valuation, which shall be ascertained by the estimate
 of three engineers, one to be selected by the city council, one by the
 water works company and these two to select the third, Provided,
 that nothing shall be paid for the unexpired franchise of said com-
 pany.'

2. That the Water Works Company owns and operates a system of
 water works by which it supplies the City of Omaha with water,
 and it also supplies the cities of South Omaha, Dundee, Benson,
 Florence and East Omaha.

3. The city of Omaha desires and thinks that it is proper, and
 therefore, asks, that the appraisalment to be made by your Board
 shall be in detail, so far as practicable, giving the values of the
 different items of tangible property owned by said company under
 proper classification; also a separate valuation upon its value as a
 going concern if any shall be determined and also that there be a

62 separate valuation placed upon the works of said company
 in and necessary for the purpose of supplying the City of
 Omaha and its inhabitants, together with the necessary and
 proper pumping stations; and separate valuations for the property
 located in and necessary for the supplying of the cities of South
 Omaha, Dundee, Benson, Florence and East Omaha; and if de-
 sired by the water company, that there may be a valuation made
 upon the entire plant as a whole, including that which is located in
 and necessary for the supply of Omaha, South Omaha, Dundee,
 Benson, Florence and East Omaha.

4. As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the Water Company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the Water Company, the City of Omaha suggests that this Board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, whose judgment the question of value must be submitted upon the examination of the property.

C. C. WRIGHT,
City Attorney."

Q. What Mr. Wright have you reference to?

A. Mr. C. C. Wright, the city attorney, and the Mr. Wright whom Mr. Congdon has testified to as being in charge of the city's side of the matter.

Q. He was at that time the regularly elected bona fide and acting city attorney, was he not?

A. Yes sir.

Q. And was in charge of the appraisalment on behalf of the city?

A. Yes sir.

Q. And is now representing the city in this litigation?

A. Yes, representing the city and water board.

Q. What else, if anything, was done by the appraisers in the way of investigation?

163 A. Well, there was some little discussion there as to who should prepare the inventory and state the water company's property and we insisted on preparing our own inventory, which we did, by making maps and plans of all our property, and of supporting them whenever there was any question raised by the city by testimony.

As a matter of fact in the course of the hearing the city agreed to at least to a very great part of the water company's inventory and admitted its correctness; there were only one or two matters, as I remember now, I may of course not state them all, but the main controversy was in regard to the rip rap which they claimed our claims were too large, but in the main the city agreed with us; they agreed with us entirely as to the whole pipe line, the quantities and the location; they agreed with us as to all our street car crossings; they agreed with us as to everything we had above ground; I don't think there was a single thing that the city disagreed with us about

before the appraisers. Of course it is to be understood that as suggested by Mr. Wright in his plan of procedure, we did not offer any evidence of value as to the property which was contained and shown in our inventory by plans and specifications and by proof. We simply showed quantities as had been suggested by Mr. Wright in his plan, and we called no experts on the question of values, because we believed, with Mr. Wright that Mr. Wright was right in his proposition that the appraisers were the experts to pass upon these values.

Q. Then it was left to the appraisers to arrive at the values?

A. On the question of value. The only questions of value that we ever raised, and in the course of that I believe we proved the price of stone at certain dates, and some rip rap material, what it cost to get it in.

Q. What action, if any did the appraisers take as to investigating the plant outside of the testimony that was offered as to the—

A. Oh, they make a very thorough and complete investigation, made many and repeated examinations of the plant, entirely outside of this question of evidence.

Q. That is what I am asking, what they did outside of this.

A. The evidence so-called, was simply our claims and our showing as to what property we had.

Q. What was done in the way of presenting them to the appraisers?

A. The same order, so far as our part was concerned, the city also had some contentions of their own.

Q. Did the city, through Mr. Wright, present some plans and maps and drawings, etc?

A. Yes, I think they did.

164 Q. Now, what else did the appraisers do in the way of investigating for themselves?

A. Oh, they examined the property and went out and saw it, and went over it, and investigated a great deal, I don't know just the course of their investigation, but I know they investigated and worked a great deal for themselves.

Q. Are you able to state any more in detail what they did in the way of investigating?

A. Well, I remember early in this matter they went all over the whole plant, I was with them and I think Mr. Wright was with them when they went all over the whole plant and were shown everything.

Q. That is, everything that was on above ground?

A. Yes.

Q. What did they do if anything in the way of investigating the pipe underground?

A. Well, with reference to investigating the pipe underground, they dug up probably twenty or thirty places, a great number, first a number of places were selected and they dug them up and then the city named a number of other places, that they wanted dug up, and those were dug up in spots selected by the city engineer.

Q. Did they designate certain places by the city engineer as defective?

A. The pipes were dug up.

Q. Do you mean to say the pipes were cut out?

A. Yes, pieces of pipe were cut out at places indicated by the city and other parties.

Q. That is, at every place the city indicated?

A. Yes sir.

Q. And did the city indicate any other or further investigation that it desired the appraisers to make than what you have already stated?

A. I don't think so.

Q. Did the appraisers make investigations along the lines and every line suggested by the representatives of the city?

A. I think so, I don't know of anything that they didn't make; of course I am speaking now of such requests that were made in my presence.

Q. Well, so far as you know?

A. So far as I know everything of that kind was acquiesced in.

Q. Have you anything further to say as to any other investigations or matters considered by the appraisers further than you have already stated, and as appear in the written record herein offered?

A. I don't remember of anything further except that I remember in the beginning of the appraisement Mr. Wright insisted that the valuation should be, or he had agreed that 165 it should be as of September of the year in which the appraisement commenced. That was afterwards withdrawn, I believe, as they claimed some other time, and later went into court and got an Order that the appraisement should be made fixing the value as of the date of the award. There is one other thing that I desire to say, the plan adopted in getting up the inventory which is really what is covered by the evidence, so-called, of the company, was that we would prepare our blue prints and plans of what we claimed was the condition of the property of the company, or the schedules and estimates of the pipe lines, and would deliver those to the city; then if the city did not object to them why we offered nothing further, that is, if they agreed to them and consented that they were correct; if they asked for any proof in regard to their correctness, we gave those by the men who made the plans. For instance, we proved a great deal of the first plans of the building by Mr. Marshall who was present when they were made; of the rip rap by Captain Reynolds who was here at the time the rip rap was laid; and wherever there was any question we offered the proof to satisfy the city; I think I am correct in saying that the record will show that pretty much all that property, and in fact all the pipe line was absolutely agreed to by the city as being correct.

Q. But where there was any question the matters in dispute were identified or the maps or plans or whatever they were, were identified by the man who made them?

A. Yes sir.

Q. And that identification is in the record here?

A. Yes, sir, that is where they could be, in some few instances there could not be absolute proof, it was just a general proof of underground construction in some places.

Q. What special investigations, if any, were made by the appraisers, as to the condition of the rip rap?

A. Well, my recollection is that they had holes dug in the rip rap in some instances; and I know personally that they made a very thorough investigation of the rip rap out there, I saw holes which I was informed were made by the appraisers or told to be made by them, in the rip rap.

Q. And their attention was particularly called to all the rip rap included in the inventory of the water company, was it?

A. Oh, yes, they went over that very thoroughly, that was one of the points of contention.

Q. And do you know whether or not their attention was particularly called to all the things and matters covered by the inventory, and so presented by the water company?

A. I do not think of anything that was omitted. I think everything was covered.

Q. And the appraisers had an opportunity to investigate for themselves the condition and value of everything that was owned by the water company?

A. Oh, they not only had an opportunity, but they did investigate it entirely apart from the inventory of the company.

Q. Is there anything further you wish to state, Mr. Hall?

A. I wish to state that at the close of the formal hearing and when the inventory of the water company was complete, Mr. Mead, the chairman of the board of appraisers, in closing the formal sessions, made the following statement:

"In closing this session of the board, which by common consent of the parties to this appraisal, is to be regarded, as the last on which formal evidence is to be presented, and after receiving and listening to the able arguments of counsel, the matter of this appraisal has been formally handed to this board, the board wish to call the attention of the parties to this appraisal, to the fact that while much work had been already done that the work of valuation of this board as a board has only just commenced. We have before us some thousand or more plats, diagrams, schedules, descriptive matter, some two thousand pages of evidence, and the arguments of counsel.

It becomes the duty of this board now to examine in detail these various schedules, to weigh the evidence presented, to examine the arguments which have been forwarded from this mass of matter, to arrange a schedule on which a valuation can be made by the board. It is undoubtedly evident to all who have followed closely these proceedings, that this will involve a considerable labor; that undoubtedly much more information must be sought by the Board than that already presented; and that the board will undoubtedly wish to call on the city and the company for special information as to details, the necessity for which will develop as the work proceeds.

In this connection I wish specially to call your attention to the

fact that this is not a work of days or of weeks, but of months. While the board will undoubtedly take this matter up as expeditiously as possible, it must be recognized that the members of this board have other demands upon their time besides that of this appraisal, and I speak these words simply to make clear
167 the fact that we recognize that no immediate report can be made, and that no such immediate report must be expected in this connection.

If there are no further matters to come before the board the board will stand adjourned. I will say in this connection that the members of the board will probably remain in Omaha over Saturday in order to collect the various exhibits and to prepare for further work."

The witness excused.

Adjournment was here taken to Thursday, February 28th, 1907, at 2 o'clock P. M.

2 O'CLOCK P. M., THURSDAY, *February 28th, 1907.*

Pursuant to adjournment the following proceedings were had.

Parties met at the office of John L. Webster in New York Life Building, Omaha, Nebraska, at which time the following testimony was taken on behalf of the defendants; R. S. Hall, attorney, appearing for plaintiff, and John L. Webster, attorney, appearing for the defendant:

GEORGE W. CRAIG, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Examined in Chief.

By Mr. WEBSTER:

Q. Mr. Craig, state what official position you held in the city of Omaha during the time when the board of appraisers were taking testimony in the appraisalment of the water works plant?

A. Assistant City Engineer.

Q. Were you present during the sessions of the board of appraisers while hearing testimony in the City of Omaha at their different meetings?

A. Yes sir, I was.

Q. Do you know of the fact of the board of appraisers at one or more times inspecting any portions of the water works plant?

A. Yes sir.

Q. What announcements, if any, were made by the board of appraisers during their public sessions for receiving evidence, of their purpose or intention of visiting or inspecting any part or parts of the water works plant?

A. Why at different sittings, sometimes they would decide to go out to the water plant or to examine the condition of the pipe, and other times would make examination of the reservoir and rip rap, and they invariably made known their wishes in advance that they

proposed to see these things, either in the afternoon or the following morning, or set a time when they would.

Q. At these different——

168 By Mr. HALL:

Q. Did you say invariably, is that the language you used?

By Mr. WEBSTER:

Q. At the times of the sessions of the board when these announcements were made, what was the fact as to whether or not they were at the open public meetings when the different parties were represented by their attorneys or other persons and if so who usually represented the city and who represented the water company at these sessions?

A. Why so far as I know the sessions were all public, and there were representatives of the Water Company present and also those of the city.

Q. Were they the attorneys representing the respective parties?

A. Mr. Wright most generally represented the city as attorney, and Mr. Hall for the water company. There were at times other attorneys for the Water Company present.

Q. Do you know what the fact is as to whether or not these public announcements of the board of appraisers were made to the end that the city and the water company might be represented if they chose to be at the time of these examinations of the water works properties?

By Mr. HALL: Objected to as calling for conclusion of the witness, having him substitute for the ideas of the appraisers his own ideas, incompetent.

A. It is my understanding that it was done for the purpose of giving us an opportunity to be present if we so desired.

By Mr. HALL: Plaintiff moves to strike out what the understanding of the witness was, as not competent.

Q. Who was present at the time of these different examinations representing the city of Omaha?

A. Mr. Wright and myself; on most occasions, part of the time Mr. Rosewater, city engineer, was present, and also Mr. Lyman Cooley.

Q. At the time when the board of appraisers were making examinations, who were present representing the water company?

A. Part of the time the general manager, Mr. Fairfield, and a greater part of the time, Mr. Marshall, their engineer.

Q. Were you present at the time or times when the board of appraisers was examining the rip rap work, or river work, at Florence?

A. Yes sir.

Q. At the times of the examination of the pumping stations or reservoirs at Florence?

A. Yes sir.

Q. And at the time of the examination of the Walnut Hill reservoir?

A. Yes sir.

169 Q. And the Poppleton Avenue Station?

A. I do not have any recollection of being present at the Poppleton Avenue station.

Q. At the times when the board of appraisers were opening up water mains for the purpose of inspecting the condition of the water mains and pipes?

A. Yes sir, I was present.

Q. So far as you know then. Mr. Craig, was there any examination or inspection ever made by the board of appraisers of any part of the water works plant of the City of Omaha or at Florence when either you yourself or some other representative of the City of Omaha, was not present?

By Mr. HALL: Objected to as leading, suggestive, immaterial, incompetent.

A. No sir.

Q. By that answer you mean that you, yourself, or some representative of the city, was present at all times when inspections were made, so far as your own knowledge goes?

A. Yes sir.

Cross-examination.

By Mr. HALL:

Q. Are you speaking now of the time during which the open sessions of the board were being held? I mean, you do not know what occurred after that, do you?

A. No sir.

Q. Don't you know that at the time when they were making the formal statements of each party in open session, don't you know that two or three times the board went out by themselves and made inspections?

A. I don't remember of such an instance.

Q. Will you say they did not?

A. I am not able to say positively that they did not.

Q. Do you remember the time when they went out and inspected the Poppleton Avenue Station and the high service over near Bancroft Street and over in there?

A. No sir, I do not.

Q. Do you say they did not make those inspections?

A. I have no recollection of their making such an inspection.

Q. I know, but do you say they did not?

A. Not that I know of.

Q. I know, but do you know well enough to be able to say that they did not make it?

A. No sir.

Q. All you mean to say is, so far as you are informed, they did not?

A. Yes sir.

Q. Were you present at all the sessions of the board?

A. I am unable to state positively whether I was or not.

170 Q. Were you present when they inspected the Burt Street plant?

A. Yes sir.

Q. When was that?

A. I cannot give you the dates.

Q. Who were there?

A. I think I am mistaken about the Burt street station, I do not think I was there at all, I had the other station in mind.

Q. Now recalling it to your mind, isn't it true that you were not there at all when they inspected the Burt street station?

A. I have no recollection of being at the Burt Street Station.

Q. Isn't it true that the engineers themselves went down alone and inspected that station at the noon hour without anybody being present?

A. It is possible they did, I never heard of that being done.

Q. Didn't you hear of the fact that they did inspect the Burt Street Station?

A. No sir.

Q. Well, you don't claim to have heard or to carry in your mind what occurred during that investigation, do you, only in a most general way?

A. Oh, it is impossible for me to remember everything that took place. I have a pretty general knowledge of what did take place.

Q. You have a pretty general knowledge of the course of the appraisement just as anybody else would know?

A. Yes sir.

Q. If the record shows anything then, you would not dispute it?

A. I would not.

Q. Were you present or do you know anything about the inspection that was made around Hanscom Park of the high levels out there?

A. No sir.

Q. Calling your attention to that matter, do you remember the circumstance of the appraisers riding out on the cars and walking over the ground there and walking through Hanscom Park?

A. No sir, I have no recollection of that.

Q. Don't you know as a matter of fact that it was the custom of the appraisers to go out on the cars and view various parts of these plans in the intervals of the days on which they were holding their open sessions and was not that repeatedly talked of?

A. I have no recollection of hearing anything of that character.

Q. Do you know where the 25 acres is up northwest here that is held by the Water Company for the purpose of a reservoir in the future?

A. I do.

171 Q. How far north is that of the Country Club?

A. Why, I should say approximately, taking the south line of the tract is about opposite the north line of the Country Club.

Q. Well, when you say opposite, how far away is it from the Country Club?

A. It is about a quarter of a mile east of the Country Club and north.

Q. It would be about a quarter to a half mile walk from the Country Club, wouldn't it, to reach it?

A. I should think so, yes.

Q. Do you remember the circumstances of the appraisers going out and standing on that ground during the course of this appraisal?

A. No sir.

Q. Do you remember being told of that fact?

A. No sir, I do not.

Q. Do you say they did not do that?

A. No, sir, I do not.

Q. Do you say they did not make the investigations that I have spoken of around Hanscom Park?

A. No sir, I do not.

Q. Do you say it was not their custom to make just such excursions as that outside of the hours in which formal testimony was being offered?

A. I have no knowledge of their taking any such excursions.

Q. You have not sufficient knowledge to say that they did not, either, have you?

A. No sir.

Q. All you mean to say about that is that you do not know about it, whether they did or not?

A. If they did they never happened to speak of it in my presence or any one else that I know of.

Q. But as a matter of fact you do not know what they did with their time outside of the time they were taking the formal testimony on the claim of each party?

A. No sir.

Q. You did not go around with them all the time, did you?

A. No sir.

Q. Do I understand you to say that you did not hear anything about their investigation of the Poppleton Avenue plant?

A. It seems to me I heard Mr. Alvord speak of something in regard to the plant, but that is all that I know of.

Q. Well, you did not pretend to watch their movements and know what they did outside of the time they were taking the testimony, did you?

A. Only when I was directed to do so.

Q. Were you present when they examined the Armour well?

A. No sir.

Q. Didn't you know that they made that examination?

A. I didn't go with them any place in South Omaha.

172 Q. I know, but didn't you know that they made that examination?

A. Yes sir, I knew that they did.

Q. How did you know that?

A. I heard them speak of it.

Q. Well, then, you only knew it informally?

A. Why, you might say informally, Mr. Alvord talked to me in regard to it and asked to see some drawings that I had in my possession at that time covering it?

Q. Was that the drawing which was furnished you by the Water Company?

A. It was.

Q. Did you talk that over with Alvord?

A. Only so far as to the construction of the well and the dimensions and sizes of the Ventura meter that was located in the well.

Q. Well, had you ever seen it?

A. No, sir, I have never seen it.

Q. How many times did you go up with them to see the rip-rap?

A. I remember distinctly going with them on three different occasions, once on the east side, and once on the west side and another time we viewed the rip-rap while the water was high from the high bluffs to the north of the water works.

Q. The time you viewed it from the high bluffs to the north, who was with you?

A. Mr. Alvord, Mr. Meade, Mr. Benzenberg, and I am not positive but I think Mr. Keonig, secretary of the Water Board and myself were present.

Q. Mr. Craig did you only go to the east side once?

A. No sir, I was on the east side——

Q. I mean with the appraisers?

A. Only once.

Q. Don't you know that the appraisers were over there five times?

A. No sir, I don't know that.

Q. Do you say they were not?

A. I say I don't know.

Q. Do I understand you to say and swear that they invariably told in public in the open sessions what they were going to do after the session was over?

A. That is possibly a little definite way of putting it, so far as I know they made announcements from time to time, what they were going to do.

Q. You used the word however in your examination that they "invariably" did that, I want to know whether you really mean that?

A. I don't know of any visits that were made to——

Q. That isn't the question, Mr. Craig. I know that you don't know, and you have already testified that you don't know,
173 but what I am asking you is whether you are prepared to say on your oath that they "invariably" said in their open sessions what they were going to do with regard to examinations outside of these times in which they were engaged in taking the more formal proof?

A. (No answer).

Q. The fact is, Mr. Craig, I notice you hesitate on this answer, the fact is, you were present when they stated what they were going to do, but you cannot say whether they did a great many things, without saying anything about it or not, can you?

A. It is possible that they do things without saying it.

Q. Well, it is not only possible, but it is probable, isn't it? I have called your attention to six or seven investigations here that you don't know anything about, isn't that true? Isn't it true that it is not only possible, but it is highly probable that they made investigations without telling you anything about it?

A. It is possible that they did.

Q. Well, isn't it probable that they did?

A. Well, I can't say it is probable because—

Q. You don't know?

A. No, I don't know that, the time was pretty well occupied with things that I do know of while we were here.

Q. That is true generally through that appraisalment, is it?

A. Yes sir.

Q. And yet you don't know about these various examinations to which I have called your attention?

A. No sir.

Q. You know some that were examined that you didn't know anything about except having heard them speak of it?

A. Only the instance that I have spoken of.

Q. What instance was that?

A. That was the Poppleton Avenue Station.

Q. How about this Ventura meter?

A. I paid no attention to anything—

Q. Never mind about that, how about it, you don't know anything about that, that was not announced, was it?

A. Yes sir, it was.

Q. It was announced?

A. Yes sir.

Q. What meeting was it announced at?

A. I am unable to state.

Q. If the record shows that it was not announced, what would you say?

A. I would say the record should stand.

Q. If the record disputed the things you have been swearing to, then you would say the record was right and you were mistaken, wouldn't you?

A. Yes sir.

Q. Can you remember any dates, Mr. Craig, at all, at which any announcements were made?

174 A. No, sir, I am a poor hand to remember dates, I know that announcements were made—

Q. Do you remember the time that the pipes were examined?

A. Yes sir.

Q. How many times were the pipes examined?

A. I cannot say the exact number without referring to my notes, but there were quite a number, weren't there, quite a number of openings, probably eighteen or twenty were made?

Q. And after the first openings were made the city requested that some other openings be made, didn't they?

A. Yes sir.

Q. Did the board of appraisers make any announcement about that?

A. No, excepting that it seems to me, if I remember correctly, these additional investigations were made at another sitting of the board and they directed the openings to be made?

Q. Yes, they directed them to be made, but did they make any announcement about any examination that they would make of it?

A. I am not quite clear in my mind just how that was brought about, I know that there were certain examinations of pipe made and at the conclusion of that sitting the city made a request to have additional openings made, and at another sitting of the board this was done, and done at the request of the board, but just as to how that was brought about I am not sure, I know that it was done.

Q. Well, you know the openings were made?

A. Yes sir.

Q. Do you know whether the board of appraisers examined the places where the pipe were taken out of? The way that examination was made sections of pipe were cut out in the places selected by the city, weren't they?

A. Yes sir.

Q. And after the first sections were cut out in the places named by the city, then the city asked for additional places and sections were cut out there, weren't they?

A. Not in all cases.

Q. In all cases as requested?

A. As requested, yes sir.

Q. Well, now do you know whether or not the board of appraisers examined the places on the ground where that pipe was cut out?

A. Yes sir.

Q. Now when did they do that?

A. You have reference to dates?

Q. No, take the course of the appraisal, you could not remember dates, could you?

A. No sir, it was done at the fore part of the appraisal, shortly after the board organized.

Q. Now, that was very early, wasn't it?

A. Yes sir.

175 Q. About one of the first things they did?

A. It was.

Q. Do you mean they made an announcement of their intention to examine these places where that pipe had been taken from?

A. Yes sir.

Q. Now, if you had been mistaken about that and no such thing appears in the record, what would you say?

A. It depends upon what you would consider an announcement.

Q. Well, what would you consider an announcement?

A. Why, if they made known their wants and what they expected to do any time in advance, I would consider that an announcement.

Q. But if there wasn't anything of that kind then you would be mistaken about that, wouldn't you?

A. Yes sir.

Q. You have got the most general idea of this, haven't you, Mr. Craig?

A. Why, I have a pretty general idea, yes sir.

Q. You don't claim to remember all the specific acts or any considerable part of them of that appraisalment, do you?

A. No sir.

Q. You were kept pretty busy examining the exhibits that were brought to you weren't you?

A. Yes sir.

Q. You had to check them all up and see whether you found the maps and plans correct, didn't you?

A. I did, of course I had ample help to look after those matters.

Q. Well, when you say ample help aren't you making that a little strained?

A. Well, the city considered it ample help.

Q. Well, what do you say?

A. I possibly could have used more.

Q. You really mean that you needed more, don't you?

A. No, I would not say that, because we did the work at least to our satisfaction.

Witness excused.

Adjourned.

EXHIBIT "A".

Member of American Society Civil Engineers.

Western Society Engineers.

American Water Works Association, Franklin Institute.

Daniel W. Mead, Consulting Engineer, First National Bank Building, Chicago.

176 Water Works and Sewerage.
Hydraulic Electric and Power Plants.
Designs, Examinations, Tests and Reports.

MADISON, WISCONSIN, Jan. 3, 1906.

Omaha Water Company, Omaha, Nebr.

GENTLEMEN: I duly received the inventory recently sent; also on a previous date the blue print inventory showing additions to the system since the last schedule submitted, as well as the subdivision of the system between the various municipalities.

I wish you would kindly send two more copies of these blue prints for use of the other appraisers. We will get along with the single copies of the inventories.

Our next meeting will be held in Cincinnati on February 7th, 8th, 9th and 10th. We should like to have the books of the company brought to Cincinnati at that meeting. Our headquarters will

the Grand Hotel. I will advise you by wire of otherwise promptly,
any change takes place in our present arrangements.

Yours very truly,
(Signed)

DANIEL W. MEAD,
Chairman Board of Appraisers, Omaha Water Works.

EXHIBIT B.

Copy.

Daniel W. Mead, Consulting Engineer, First National Bank
Building, Chicago.

MADISON, WISCONSIN, *July 12, 1906.*

Omaha Water Company to Daniel W. Mead, Dr.

To one half the following bill for services and expenses from
July 1st, 1905, in connection with the appraisal of the Omaha Water
Works.

To personal services as follows:

July 6-7.....	2 days
Dec. 27-28-29-30.....	4 "
Jan. 1906, 25-26-27.....	3 "
Feb. 6-7-8-9-10.....	5 "
Mar. 1-2-3-21-22-23-24.....	7 "
May 2-3-4-5-17-18-19.....	7 "
June 13-14-15-16.....	4 "

32 days at \$50.

\$1600.00

77 Office assistants, tabulation and calculation by or- der of Board, 66 days at \$4.....	264.00
Bill of G. G. Wallace, information on real estate of Board	350.00
Bill of S. J. Brockman, estimates (order of Board)....	15.50
To expense account attached.....	375.95
Bill of American Audit Company (by order of Board) ..	102.50

\$2707.95

One half above..... \$1353.97

EXHIBIT B.

(Copy.)

Daniel W. Mead, Consulting Engineer, First National Bank Building, Chicago.

Expense Account, D. W. Mead, On Matter of Appraisal of Omaha Water Works, July 1st, 1905, to July 10, 1906.

1905.

July 6-8.	Madison to Omaha and return.....	24.00
	Sleeper	4.00
	Hotel and dinner.....	6.00
Dec. 27-30.	Madison to Milwaukee & Return.....	4.80
	Hotel expenses.....	24.00
	Expense on record.....	8.50

1906.

Jan. 24-27.	Madison to Chicago & return.....	8.85
	Hotel and expense.....	22.00
	Express on records.....	2.00
Feb. 7-12.	Madison to Cincinnati & return.....	18.00
	Sleeper	4.00
	Hotel & Exp.....	30.00
	Express on records.....	9.50
Mar. 1-3.	Madison to Milwaukee & return.....	4.80
	Hotel & Exp.....	15.00
	Express on records.....	8.50
Mar. 22-24.	Madison to Cincinnati & return.....	18.00
	Sleeper	4.00
	Hotel	16.00
	Express on records.....	9.50
May 3-5.	Madison to Cincinnati & Return.....	18.00
	Sleeper	4.50
	Hotel	16.00
178 May 17-19.	Madison to Milwaukee & Return...	4.80
	Hotel & Exp.....	18.00
June 14-16.	Madison to Chicago & Return.....	8.85
	Hotel & Exp.....	28.00
July 5-17.	Madison to Chicago & return.....	8.85
	Hotel & Exp.....	24.00
	Telegrams and postage.....	3.50

\$375.95

EXHIBIT "B".

The Omaha Water Company, to D. W. Mead, Dr.

Omaha, Neb.

Statement attached.....1353.97

Correct:

Approved for payment.

STOCKTON HETH, *Treasurer.*

Approved:

E. M. FAIRFIELD,
Gen'l Manager.

Received July 20th, 1906, of The Omaha Water Company Thirteen Hundred fifty-three 97-100 Dollars (\$1353.97) in full payment of the above account.

(Signed)

DANIEL W. MEAD.

Endorsed on back: The Omaha Water Company, Omaha Neb. No. 25977. Paid July 14, 1906. \$1353.97. To D. W. Mead. Charge to account of Inv. 1353.97.

EXHIBIT "2".

Report of the Board of Appraisers.

In the matter of the Appraisal of the property of the Omaha Water Company; The City of Omaha having, by Ordinance No. 423, and certain Ordinances amendatory thereof, provided for the construction of a Water Works system in said City of Omaha, and by Section 14 of said Ordinance No. 423, for the purchase of said Water Works, which said section is in the following terms, to-wit:

"The City of Omaha shall have the right at any time after the expiration of twenty years, to purchase the said Water Works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, and these two to select a third, provided that nothing shall be paid for the unexpired franchise of said company."

The said Water Works having been duly completed and accepted by Ordinance No. 618 of said City of Omaha, and the
179 City of Omaha having, by virtue of said Section 14 of said Ordinance No. 423, and by virtue of the terms of an act of the Legislature of the State of Nebraska, passed the following Ordinance, No. 5162, to-wit:

"An ordinance declaring that it is necessary and expedient for the City of Omaha to purchase the system of water works operated by the Omaha Water Company, and providing for notification to the water board and to said water company to each select one engineers as an appraiser to ascertain the valuation of said water works plant.

Whereas, By the express terms of an act of the Legislature of the State of Nebraska, providing in cities of the metropolitan class for the procedure in certain cases by the mayor and council in the acquisition of a municipal water plant, and for the creation of a water board, etc., approved February 2, 1903, it is made the duty of the mayor and council of the City of Omaha within thirty days after said act shall take effect to declare by ordinance that it is necessary and expedient for such city to construct or purchase (as the case may be) a system of water works; and

Whereas, Said act of the legislature declared an emergency existed for said act, and that the same should be of full force and effect from and after its passage and approval; therefore

Be It Ordained by the City Council of the City of Omaha:

SECTION 1. That under and in pursuance of the provisions of said act of the legislature of the state of Nebraska to provide in cities of the metropolitan class for the procedure in certain cases by the mayor and council for the acquisition of a municipal water plant, and for the creation of a water board, etc., approved February 2, 1903, and as required by the provisions of said act and within thirty days of the taking effect of said act the mayor and council of said city of Omaha do hereby declare that it is necessary and expedient for said city of Omaha to purchase the system of water works operated by the Omaha Water Company, and do elect and determine to purchase and acquire such water works plant by virtue of the rights inuring to said city through the contract between said city and the grantors of said water company and as authorized and provided by section 14 of the Ordinance No. 423.

SEC. 2. That immediately after the passage and approval of this Ordinance, and as soon as the water board provided for in said act is appointed and organized, the said board be notified that for the purpose of ascertaining the appraised valuation of said water

180 works plant as provided in said section 14 of ordinance No. 423, it is necessary to select and appoint one appraiser,

thereby enabling said water board to propose for appointment by the council the name of one appraiser in accordance with the provisions of said act, and that the said Omaha Water Company be also at once notified for the purpose hereinbefore stated, that it is required to also select one engineer; the two so selected to select a third engineer to the end that the appraised valuation at which the city of Omaha shall have the right to purchase said water works plant may be ascertained and the city clerk is hereby authorized and directed to give such notification, attaching thereto certified copy of this ordinance.

SEC. —. That this ordinance shall take effect and be in force from and after its publication.

Passed February 24, 1903.

W. H. ELBOURN,
City Clerk.
MYRON D. KARR,
President City Council.

[SEAL.]

Approved March 2, 1903.

FRANK E. MOORES, *Mayor.*"

And the said City of Omaha having, pursuant to the terms of said ordinance, appointed John W. Alvord, C. E., of the City of Chicago, Illinois, to act as one of the appraisers, to fix and appraise the value of such Water Works, and having given due notice to the Omaha Water Company, the successors and assigns of Sidney E. Locke, and the City Water Works Company of Omaha, that it had resolved to purchase the Water Works of said Omaha Water Company, and had appointed said John W. Alvord as one of the appraisers, and the Omaha Water Company having thereupon appointed George H. Benzenberg, C. E., of the City of Milwaukee, Wisconsin, to act as one of the said appraisers, said appraisers, John W. Alvord and George H. Benzenberg, so chosen under Section 14 of said Ordinance No. 423, and by virtue of the terms of said ordinance, met in the City of Chicago on June 18th, 1903, and duly selected Daniel W. Mead, C. E., of the City of Chicago, as the third person to act as appraiser in the valuation of the property of the Omaha Water Works.

The undersigned, said John W. Alvord, George H. Benzenberg and Daniel W. Mead, so appointed, met in the office of the Omaha Water Board in the City of Omaha at 10 o'clock A. M., on July 20th, 1903, and organized as a Board of Appraisers by the

181 election of Daniel W. Mead, as Chairman, and John W. Alvord, as Secretary of said Board, and said Board, so organized, thereupon received such testimony, plans, blue prints, inventories and other matters pertaining to the property of the Omaha Water Company, and to the value thereof, as were submitted, by various parties interested, for the purpose of fixing and determining the value of such Water Works.

A large number of meetings were thereafter held by said Board, during which time many hundreds of plans and blue prints, and several hundred pages of inventory were submitted by said Omaha Water Company, and by the City of Omaha. Many days were occupied in the receipt of a large amount of evidence, all taken under oath and covering about two thousand pages of typewritten matter.

The sessions of the Board for the receipt of such evidence were concluded on December 31st, 1904, the Board of Appraisers in the meanwhile, by numerous visits to all of the several parts of the Water Works plant, and by various excavations and examinations, having thoroughly familiarized itself with the several constituent parts of said plant, and with its various appurtenances, and as to the physical condition of the same.

Upon the conclusion of the hearings, the Board proceeded to tabulate the evidence, and to appraise the property considered, until on the 8th day of July, 1905, when the Board was enjoined by the Circuit Court of the United States of the District of Nebraska from completing said appraisement.

On December 9th, 1905, the Board received the following order, made by Hon. H. Munger, Judge of the United States Circuit Court of the District of Nebraska, to-wit:

"THE WATER BOARD OF THE CITY OF OMAHA and the CITY OF OMAHA, Complainants,

VS.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG and the OMAHA WATER COMPANY, a Corporation, Defendants.

Order.

The above entitled cause having come on to be heard on the 6th day of November, 1905, upon the application of complainants for a temporary injunction as in the Bill of Complaint prayed, and the same having been presented to the court upon the Bill of Complaint and the Answer of the Omaha Water Company and the evidence having been argued to the court by counsel for the respective parties, and the Court being fully advised in the premises, it is

182 Ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, as a Board of Appraisers appointed for the purpose of appraising the value of the system of water works operated by the Omaha Water Company, in making said appraisalment, proceed in the manner and form as hereinafter ordered and directed.

1. It is ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, make one appraisalment, which shall include the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the City of Omaha and vicinity.

2. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, make a separate appraisalment and award which shall include the intake, pumping station and reservoirs at Florence, the necessary mains connecting the same with the water works within the corporate limits of the City of Omaha, and the property connected with and used as a part of its water plant within the corporate limits of the City of Omaha, excluding therefrom the portion of said water plant in South Omaha, Dundee, East Omaha and the distribution mains in Florence; but stating therein separately the values put upon the following property, to-wit: The west twenty-five (25) acres of the south half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section Seven (7) Township Fifteen (15) Range Thirteen (13); the North fifty (50) feet of Lot Seventeen (17) the South forty-two (42) feet of the west ten (10) feet of Lot Eight (8) Block Two (2) of Armstrong's addition to the City of Omaha.

3. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in their award make a separate appraisalment and return of the value of the property of the Omaha Water Company being within the corporate limits of the City of South Omaha disconnected from the rest of the plant.

4. It is further Ordered that the said Daniel W. Mead, John W. Alvord, and George H. Benzenberg, acting as said Board of Ap-

praisers, in making their award, make a separate return of the valuation put upon the property of the Omaha Water Company in the East Omaha, disconnected from the rest of the plant.

5. It is further Ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in making their appraisal, separately state and report the value of the property of the Omaha Water Company, being within the limits of the Village of Dundee, disconnected from other parts of the plant of the Omaha Water Company's system of water works.

6. It is further Ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in making their appraisal and award, separately find and state the value of the water mains, pipes and hydrants of the Omaha Water Company in the City of Florence used for the purpose of supplying the City of Florence and its inhabitants with water, separate and distinct from the intake, pumping station, reservoirs and mains necessary to connect the same with the City of Omaha, such valuation to be the value of the property of the Omaha Water Company's system of water works within the City of Florence other than the portion mentioned in the second paragraph hereof.

7. It is further Ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, if they shall find and include in their appraisal of the value of all the property of the Omaha Water Company, as mentioned in the first paragraph that the Omaha Water Company has a going value as distinguished from the unexpired franchise, that they separately state and report the amount thereof as a distinct and separate item of valuation.

They shall further separate and state the amount of such going value upon that part and portion of the water plant as described in the second paragraph of this order.

8. It is further Ordered that the appraisers aforesaid make and return the aforesaid values, as far as practicable under the evidence and to the best of their judgment, as of the date of the award.

November 29th, 1905.

W. H. MUNGER, *Judge.*"

After the receipt of said order of the court, the meetings of said Board of Appraisers were resumed, and additional evidence as to the value of certain parts of the plant was obtained. The Board also secured the services of a disinterested party, familiar with the value of real estate in Omaha, who obtained for said Board the value of the real estate, as represented by the recent selling prices of property adjacent to the real estate of the Omaha Water Company, which information has been considered, in addition to the estimates of land values previously submitted as evidence before the Board.

After careful consideration of all the facts, evidence and information available, and in accordance with Section 14 of said Ord-

nance No. 423, and also in accordance with the order of said court, as above set forth, the Board of Appraisers find:

1st. That the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the City of Omaha and vicinity, is Six Million, Two Hundred and Sixty-three Thousand, Two Hundred and Ninety-five Dollars and 49/100. \$6,263,295.49.

2nd. The Board further find that the value of the plant, including the intake, pumping station and reservoirs at Florence, the necessary mains connecting with the water works within the corporate limits of the City of Omaha, and the property connected with and used as a part of its water plant within the corporate limits of the City of Omaha, excluding therefrom the portion of said water plant in South Omaha, Dundee, East Omaha and the distribution mains in Florence, is Five Million, Six Hundred and Fourteen Thousand, Three Hundred and Forty-six Dollars and 33/100 (\$5,614,346.33), which estimate includes the following values put upon the following properties, to-wit:

A. The west twenty-five (25) acres of the south half (S. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of Section Seven (7) Township fifteen (15) Range thirteen (13) is Sixteen Thousand Three Hundred and Sixty-six Dollars, \$16,366.00.

B. The North fifty (50) feet of Lot Seventeen (17) and the south forty-two (42) feet of the west ten (10) feet of lot eight (8) in block two (2) of Armstrong's Addition to the City of Omaha.

The above description, which is included in the order of the court as made to the Board, seems to be in error, but it appears to the Board to have been intended to cover the following described property, to-wit:

The west ten (10) feet of the north fifty (50) feet of lot seventeen (17) and the north fifty (50) feet of lot eighteen (18) in block two (2) of Armstrong's Addition to the City of Omaha on which the Board have placed a value including buildings, of Sixteen Hundred Dollars, \$1,600.00.

185 3rd. The Board find that the value of the property of the Omaha Water Company, being within the corporate limits of the City of South Omaha, disconnected from the rest of the plant, is Four Hundred and Forty-six Thousand, Two Hundred and Fifty-six Dollars and 84/100—\$446,256.84.

4th. The Board find that the value of the property of the Omaha Water Company in East Omaha, disconnected from the rest of the plant is Twenty-one Thousand, Five Hundred and Sixty-eight Dollars and Fifty Cents, \$21,568.50.

5th. The Board find that the value of the property of the Omaha Water Company, being within the limits of the Village of Dundee, disconnected from the plant of the Omaha Water Company's system of water works, is Nineteen Thousand, Three Hundred and Ninety-eight Dollars and Eighty-three Cents (\$19,398.83).

6th. The Board find that the value of the water mains, pipes and hydrants of the Omaha Water Company in the City of Florence, used for the purpose of supplying the City of Florence and its in-

habitants with water, separate and distinct from the intake, pumping station, reservoirs and mains necessary to connect the same with the City of Omaha, said valuation being the value of the property of the Omaha Water Company's system of water works within the City of Florence other than the portion mentioned in the second finding hereof, is Thirteen Thousand, Eight Hundred and Eighty-one Dollars and Thirty-one Cents, \$13,881.31.

7th. The Board find and include in their appraisalment of the value of all the property of the Omaha Water Company, as mentioned in the first finding, that the Omaha Water Company has a going value as distinguished from the unexpired franchise, and have fixed said value at Five Hundred and Sixty-two Thousand, Seven Hundred and Twelve Dollars and Forty-five Cents, \$562,712.45.

And said Board further find that the amount of such going value upon that part and portion of the water plant, as described in the second finding hereof, is Four Hundred and Seventy-Eight Thousand, Three Hundred and Five Dols. & 59/100 \$478,305.59.

8th. In accordance with the 8th paragraph of the order of the Court, the appraisers report that the aforesaid values as far as practicable have been made under the evidence and to the best of their judgment, as of the date of this reward.

There has also been included in the above appraisalment the valuation of certain stock and materials on hand, which valuation is based on an agreed inventory prepared by the representatives of the Omaha Water Company and the City of Omaha, and of dates of November 3rd to 16th, 1904. This inventory, together with the prices fixed on each item of the same, is transmitted herewith, and should be revised and corrected in accordance with the material on hand at the time of transfer, and the valuation herein contained should be modified in accordance with the materials on hand at that time.

The valuation as made includes all schedules submitted to us of work and material included in the plant to January 1st, 1906.

Respectfully transmitted,

DANIEL W. MEAD.
G. H. BENZENBERG.

I do not concur in the above report, nor in the values as fixed therein.

JOHN W. ALVORD,
Board of Appraisers.

CHICAGO, ILLINOIS, July 7th, 1906.

To the Water Board of the City of Omaha and the Omaha Water Company.

EXHIBIT "3."

Resolution.

Whereas: Pursuant to certain proceedings heretofore had between the City of Omaha and the Omaha Water Company, under and pursuant to Section 14 of Ordinance No. 423, and subsequent proceedings of the city council of the city of Omaha, relating thereto, three engineers, John W. Alvord, G. H. Benzenberg and Daniel W. Mead, were selected to ascertain the appraised valuation of the Water Works, under and by virtue of Section 14 of said Ordinance No. 423, and

Whereas: Said engineers have this day submitted to the Water Board of the city of Omaha a report, and which said report, purporting to be an appraisement of the Water Works, is not the report of the said three engineers, and is not an appraised valuation estimated by the said three engineers, and

Whereas: Said report, in the manner and form as made, is unauthorized, illegal and void, and

Whereas, it appears upon the face of said report that one of the engineers, so selected, John W. Alvord, did not concur in said report, nor in the values fixed in said report, as appears upon the face thereof, and by reason thereof the said report does not represent an appraised valuation ascertained by the estimate of the said three
187 engineers, as required by the said Section 14 of said ordinance No. 423, and

Whereas, the said engineers, Daniel W. Mead and G. H. Benzenberg, in arriving at their said valuations have pursued irregular and unauthorized methods of procedure, and have in many particulars acted in violation of law, and of their duty in the premises, and

Whereas, the valuations agreed upon by said engineers, Daniel W. Mead and G. H. Benzenberg are so greatly above the real value of the property, and so excessive as to be evidence that the same are irregular, wrongful and fraudulent, and

Whereas, said engineers, Daniel W. Mead and George H. Benzenberg, sitting as appraisers, did not act upon their own judgment as to valuations, but upon evidence presented to them by the Omaha Water Company, which said evidence was misleading and deceptive and by reason whereof, the said engineers, Daniel W. Mead and G. H. Benzenberg, acting as appraisers were misled and deceived, and induced to give the said property valuations which were greatly above their real value, which said evidence the said engineers were without authority to receive, and which was so received over the objection of the City of Omaha; and over the objection of the Water Board of the City of Omaha; and the purpose and object of which said evidence was to give to the Water Works a fictitious valuation over and above its real value, and

Whereas: The said engineers, Daniel W. Mead and G. H. Benzenberg, acting as appraisers, in violation of their duty, and against

the continued protests and objections of the city of Omaha and of the Water Board of the City of Omaha, did by continuances and accommodations, and otherwise, grant and extend to the Omaha Water Company a period of nearly one year and a half of time, so as to enable the officers, agents and representatives of the Omaha Water Company to prepare maps, plans, diagrams and other detailed forms of evidence, some of which did not, in fact, represent existing properties, and many of which maps, plans, diagrams and detailed statements purported to represent properties, construction work and materials which were not within the personal knowledge or observation of the persons who prepared the said maps, plans, diagrams and detailed statements, and which in truth and in fact, were not proper or competent evidence of the properties, construction work and materials which they purported to represent, and which were misleading and deceptive to the said engineers, and yet were received and accepted and acted upon by the said engineers.

188 Daniel W. Mead and G. H. Benzenberg, and without original investigation on their part to know whether the said maps, plans, diagrams and detailed statements were correct or incorrect; and the said engineers, Daniel W. Mead and G. H. Benzenberg, acting as appraisers, were in fact, misled and deceived by the said plans, diagrams and detailed statements, and by reason of the same were induced to, and in fact did, give to the properties of the Omaha Water Company, on account thereof, valuations far in excess of the real values of the properties so estimated, and

Whereas, the said engineers, Daniel W. Mead and G. H. Benzenberg, acting as appraisers, permitted the officers and agents of the Omaha Water Company to present to the said engineers in secret, in the City of Cincinnati, in the state of Ohio, at a meeting there held by the said engineers, books and other documentary evidence of the said Water Company, over the written protest and objection of the Water Board of the City of Omaha, and which secret evidence, consisting of books and records, was presented to the said engineers by the officers and representatives of the Omaha Water Company, and was received by the said engineers Daniel W. Mead and G. H. Benzenberg, and considered by them, notwithstanding the protest of the Water Board, and which evidence so submitted to the said engineers, the Water Board, its attorneys and representatives, were refused permission to see; and which proceeding was so grossly irregular as to render null and void the action of the said engineers, Daniel W. Mead and G. H. Benzenberg, in arriving at their valuation, and to the great wrong and prejudice of the City of Omaha, and

Whereas: The said engineers, Daniel W. Mead and G. H. Benzenberg, acting as appraisers, either consented to said books and documents of the Omaha Water Company being transmitted, or caused said books and documents to be transmitted from the City of Cincinnati to the City of Chicago, to be thereafter further examined or considered by the said engineers, Daniel W. Mead and G. H. Benzenberg, and which books and documents were so subsequently considered by the said engineers, Daniel W. Mead and G. H.

Benzenberg, and over the protest and objection of the attorneys and representatives of the City of Omaha, and of the Water Board of the City of Omaha, and by reason of which said consideration the said engineers, Daniel W. Mead and G. H. Benzenberg, were wrongfully induced to give said properties a valuation so grossly in excess of the real value as to make the same fraudulent and void, and

Whereas, The said engineers, Daniel W. Mead and G. H. Benzenberg, in arriving at their appraised valuation of the
189 Water Works, acted illegally and wrongfully in arriving at their estimate of the valuation, in the particular that they based their said valuation upon the cost of reduplication, and refused to consider any and all other matters whatsoever bearing upon the real value of the said properties, and which said report does not in fact represent the real values of said properties, but represents a fictitious valuation arrived at by improper methods, and

Whereas, The City of Omaha, by an ordinance passed February 24, 1903, and approved March 2, 1903, declared that it was then necessary and expedient for the City of Omaha to purchase the Water Works of the Omaha Water Company, and did, by said ordinance then elect and determine to make such purchase, and which said ordinance was then passed with the purpose and intent of buying the water works within the corporate limits of the city of Omaha, and the property necessary and appurtenant thereto in the City of Florence, as the same then existed, and upon the valuation of said properties as the same then and there existed, and

Whereas, The said engineers, Daniel W. Mead and G. H. Benzenberg, did not arrive at their valuation set down in said report as being the valuation of the said properties at the time when the said ordinance was so passed and approved, but the said engineers, Daniel W. Mead and G. H. Benzenberg, set down in their said report what purported to be their estimate of the valuations of the said properties as they existed July 7, 1906, and that in the meantime, to-wit: from March 2, 1903, to July 7, 1906, the prices of iron pipe, water mains, hydrants, valves and machinery had greatly enhanced, and that by the adopting of the said last named date as the one for fixing the valuation, the City of Omaha has been greatly wronged and damaged, and the said valuation as fixed in the said report so signed by the said Daniel W. Mead and G. H. Benzenberg is illegal and void, and.

Whereas, The said engineers, Daniel W. Mead and G. H. Benzenberg, in their said report, in estimating the values of the properties in South Omaha, East Omaha and Dundee, and the mains, pipes and hydrants used for the purpose of supplying the City of Florence and its inhabitants with water, did not give to the same their full and proper valuation, and refused to take into account the rents, profits and revenues arising to the Omaha Water Company from the distribution of water to South Omaha, East Omaha, Dundee and Florence, but to the contrary appraised that part of the property
190 within South Omaha, East Omaha, Dundee and Florence as so much pipe and so many hydrants in the ground, at their present estimated value as iron, water mains and hydrants,

as if the same were entirely disconnected and separated from the use of supplying water to the inhabitants of the said respective suburban cities, towns and villages, and by reason whereof the valuation of the water works fixed upon that part of the property within the corporate limits of the city of Omaha, including the intake to Florence were proportionately swelled beyond their real value; and the valuation of the properties in South Omaha, East Omaha, Dundee and Florence was proportionately diminished, and that the said apportionment of valuation between the City of Omaha and the said cities of South Omaha, East Omaha, Dundee and Florence, as made, were improperly and wrongfully apportioned, and were illegal and void, and

Whereas, It appears upon the face of said report that the same is incomplete, and the latter part thereof refers to an inventory which is to be revised and corrected, and which, according to said report, was therewith transmitted to the Water Board of the City of Omaha, and

Whereas, In truth and in fact the said inventory so referred to as a part of said report, was not so transmitted to the Water Board of the City of Omaha, and has not been received by the Water Board of the City of Omaha, and

Whereas, It appears from the said report that there has been included in the gross valuation, the values named in the said inventory, which are to be changed and corrected, and whereas, there is no way reserved for said revision and correction; the said report is not a completed appraisalment, and is irregular, illegal and void, and

Whereas, The said engineers, and particularly the said Daniel W. Mead and G. H. Benzenberg, in the course of their whole proceedings, relating to the said appraisalment, from the inception thereof on the 20th day of July, 1903, down to and including the 7th day of July, 1906, have been guilty of many gross wrongs and irregularities in the method of their proceedings, and in the manner of reaching their valuations, other and different from those hereinbefore mentioned more particularly, which of themselves are sufficient to make the report of valuation so agreed upon by the said Daniel W. Mead and G. H. Benzenberg unjust, excessive, illegal and void, and

Whereas: The said valuation so agreed upon by the said Daniel W. Mead and G. H. Benzenberg, is no appraisalment in manner and form as required by Section 14 of Ordinance 423, and is illegal null and void.

Therefore be it Resolved;

191 By the Water Board of the City of Omaha that said report be, and the same is, hereby rejected.

EXHIBIT "4."

Copy.

OMAHA, July 9, 1906.

Adjourned Meeting.

The Water Board of the City of Omaha met as per adjournment of July 3, 1906, in the office of the said board in the City Hall of the said city, at 8 o'clock P. M., of July 9, 1906, Chairman Milton T. Barlow presiding.

There *was* present at this meeting the following members of the said Board, to-wit:

John F. Coad, Isaac E. Congdon, A. H. Hipple, R. Beecher Howell and Milton T. Barlow, Ch'n.

The report of the Board of Appraisers on the valuation of the Omaha Water Works System was read, and upon motion of R. Beecher Howell, seconded by Isaac E. Congdon, the following resolution was adopted by unanimous vote upon roll-call.

(* * * *Rejecting Report of Appraisalment.* * * *)

Upon motion of John F. Coad, seconded by A. H. Hipple, the following resolution was adopted by a unanimous vote upon roll-call:

(* * * *To Appoint a New Appraiser.* * * *)

Upon motion of R. Beecher Howell, seconded by Isaac E. Congdon, and unanimously carried upon roll-call, the meeting adjourned until 8 o'clock P. M. of tomorrow, July 10, 1906.

ARNOLD C. KOENIG, *Secretary.*

EXHIBIT "5."

Office of Water Board of the City of Omaha.

James E. Boyd, Chairman; Milton T. Barlow, John F. Coad, Isaac E. Congdon, Dr. A. H. Hipple, R. Beecher Howell.

Arnold C. Koenig, Sec'y Water Commissioner.

OMAHA, NEB., February 3, 1906.

Mr. Daniel W. Mead, Chairman of the Board of Appraisers of the Water Works at Omaha.

DEAR SIR: At the time when the Board of Appraisers were taking testimony in the City of Omaha relating to the Water Works plant, the representatives of the Omaha Water Company stated that they were willing to allow the appraisers to ex-

amine the books of the Omaha Water Company, but were unwilling to submit the said books to the inspection of the attorneys or representatives of the City of Omaha.

All of the testimony which was taken before the Board of Appraisers was taken in open session when both parties could be present or represented and, among other things, it was ruled by the board that all exhibits, maps, etc., produced by the Water Company and by the City of Omaha were to be submitted to the attorneys and representatives of the adverse parties. During the progress of the taking of the said testimony, the attorney for the City of Omaha at all times demanded that if the books of the Water Company were to be produced for the inspection of the Board of Appraisers, it should be done in open session or at such time and under such circumstances that the City of Omaha could likewise inspect the said books to the end that it might be permitted to make such examination thereof and introduce such other testimony relating thereto as in the judgment of the attorney might be desirable.

The city of Omaha has become advised by a statement made by the Omaha Water Company in connection with the transmission of certain maps and supplemental showing lately submitted to the Board of Appraisers that the Omaha Water Company is still desirous of submitting its books to the board of appraisers but without giving the City of Omaha an opportunity to inspect the books. Under the circumstances, the City of Omaha wishes to protest against the private submission by the water company of its books to the Board of Appraisers, as each proceeding would be out of harmony with the proceedings relating to other testimony offered before the board.

The City of Omaha does not mean by this communication to protest against putting the books of the water company in evidence before the Board of Appraisers, but if the Water Company does, the city desires and demands that it shall have an opportunity to be present when the books are submitted, and to make a personal examination either by its attorneys or by an accountant of all the matters and things in said books so submitted to the appraisers, and if the City of Omaha shall then be of the opinion that said books so submitted do not correctly represent the facts or in any manner are inaccurate, that the city shall be permitted to
193 offer such testimony as it may be advised is pertinent or material to the matters so contained in the said books.

THE WATER BOARD OF THE
CITY OF OMAHA,

By C. C. WRIGHT,

Its Att'y and Att'y for City of Omaha in Said Matter.

CITY OF OMAHA,

By JOHN P. BREEN, *City Attorney.*

EXHIBIT 7.

Copy.

F. M. H. 2126-07.

NEW YORK, January 3, 1907.

To the Union Stock Yards Company of Omaha, Limited:

The Omaha Water Company hereby requests of the Union Stock Yards Company of Omaha, Limited, that the contract between the two Companies, dated March 17, 1898, be terminated on the tenth day of July, 1907, notice of said request being hereby given in writing six months prior to the date of such desired termination, upon which date said contract will by this request be terminated, as in said contract provided.

By the authority of the Board of Directors,

THE OMAHA WATER COMPANY,
By THEODORE C. WOODBURY, *President*.

Attest:

(Signed) HOWARD MANSFIELD, *Secretary*.

EXHIBIT "8." F. M. H. 2-26-07.

(Copy.)

NEW YORK, January 3, 1907.

W. J. C. Kenyon, Esq., General Manager, Union Stock Yards Company of Omaha, Limited, South Omaha, Neb

DEAR SIR: On behalf of the Omaha Water Company, I enclose herewith and deliver to you, as representative of the Union Stock Yards Company of Omaha, Limited, a request to that company that the contract between the two companies of March 17, 1898, be terminated on the tenth day of July, 1907.

While it is not my purpose to interfere with pending negotiations, yet, in view of delays, the notice is given for the protection of this company.

Yours very truly,

(Signed) THEODORE C. WOODBURY, *President*.*Ordinance No. 4691.*

An ordinance providing for submitting to the electors of the City of Omaha at the general city election to be held in said city on Tuesday, March 6th, 1900, the question and proposition of issuing bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars for the appropriation or purchase of water works or land

therefor and authorizing and directing the Mayor to issue his proclamation and give notice of the submission of said question and proposition at such election:

Be it ordained by the City Council of the City of Omaha:

SECTION 1. That the question and proposition of issuing bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars for the purpose of appropriating or purchasing water works or land therefor shall be and hereby is authorized and directed to be submitted to the electors of said City of Omaha at the general city election to be held in said City on Tuesday, March 6th, 1900, the said bonds to be called "Water Works Bonds of the City of Omaha," the same to be issued in denominations of one thousand (\$1,000) dollars each, at such times and in such amount as may be necessary for such purpose, and to run for twenty (20) years from the date of issue thereof and to bear interest payable semi-annually at a rate not exceeding four (4) per centum per annum, with interest coupons attached, and not to be sold for less than par, the proceeds thereof to be used for no other purpose than for the appropriation or purchase of water works or land therefor, the said question and proposition to be submitted to the electors of the City of Omaha in the following form:

"Shall the bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars be issued for the purpose of the appropriation or purchase of water works or land therefor, the said bonds to be called "Water Works Bonds of the City of Omaha," the same to be issued in the denomination of one thousand (\$1,000) dollars each, at such times and in such amounts as may be necessary for such purpose, and to run for twenty (20) years from the date of issue thereof, and to bear interest payable semi-annually at a rate not exceeding four per cent per annum, with interest coupons attached, payable at the fiscal agency of the State of Nebraska in New York City, and not to be sold for less than par, the proceeds thereof to be used for no other purpose than for the appropriation or purchase of water works or land therefor."

195 SEC. 2. That the Mayor of the City of Omaha be and hereby is authorized and directed to issue his proclamation and give public notice of the submission of said proposition to the electors of said City of Omaha at said election at least twenty (20) days prior to said election and setting forth in said proclamation and notice the said question and proposition entire.

SEC. 3. The said question and proposition of voting water works bonds shall be submitted to the electors of the City of Omaha entire, and official and sample ballots for said general City election of March 6th, 1900, shall be prepared by the City Clerk, which shall contain such question and proposition in form suitable for voting and the necessary number of said ballots shall be by said City Clerk properly distributed and delivered to the judges of each election district within said City in the manner prescribed by law. Under the said question and proposition shall be printed on the official and sample ballots the word "Yes" and the word "No" in separate lines.

All official ballots of said legal electors with an "X" mark following the word "Yes" upon said official ballot cast at said election shall be counted and considered in favor of the issuance of said water works bonds mentioned in said question and proposition in the amount and at the time thereon specified and as authorizing the issue and sale of said bonds; and all official ballots of said legal electors with an "X" mark following the word "No," upon said official ballots cast at said election shall be counted and considered as against the issuing of said water works bonds mentioned in said question and proposition.

SEC. 4. That for the payment of the principal of said water works bond and for the payment of the interest coupons thereunto annexed, the good faith, credit, property and revenues of the City of Omaha be and hereby are pledged and a sinking fund for the purpose of paying the interest on said bonds and the principal of said bonds as the same mature, is hereby authorized and required to be made from the net proceeds, profits and revenues derived from the ownership and operation of said water works plant, and the said net proceeds, profits and revenues over and above the actual expenses of operating said water works and for material, supplies and improvements thereon, shall be devoted and used only for the purpose of creating and maintaining such sinking fund.

SEC. 5. That this ordinance shall take effect and be in force from and after its passage.

Passed Jan. 23, 1900.

BEECHER HIGBY, *City Clerk.*
W. W. BINGHAM,
President City Council.

[SEAL.]

196 Approved Jan. 29, 1900.

FRANK E. MOORES, *Mayor.*

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

DAN B. BUTLER, *City Clerk.*

Endorsed on the back: Ordinance No. 4691. An Ordinance providing for submitting to the electors of the City of Omaha at general city election to be held in said City on Tuesday, March 6th, 1900, the question and proposition of issuing bonds of the City of Omaha in the sum of Three Million (\$3,000,000) Dollars for the appropriation or purchase of water works or land therefor and authorizing and directing the Mayor to issue his proclamation and give notice of the submission of said question and proposition at such election. Burnester, Bingham. Passed 1-23-1900. Comptroller Om. Water Co., Bee. W. H. B. B., 2-3-1900. Presented to Council, Jan. 9, 1900. 1 & 2 Title, Fire, Water & Police. Beecher Higby, City Clerk. Returned by Mayor, Jan. 30, 1900.

EXHIBIT 10. F. M. H., 2-26-07.

Election Proclamation by Mayor.

Proclamation and notice to the electors and legal voters of the City of Omaha of a general City election of the City of Omaha to be held Tuesday, the 6th day of March, 1900, for the purpose of electing a Mayor, City Clerk, Treasurer, Comptroller, Tax Commissioner, and nine Councilmen, and of submitting propositions to vote bonds:

To the Electors and Legal Voters of the City of Omaha:

I, Frank E. Moores, Mayor of the City of Omaha, do issue this, my proclamation, and by the authority vested in me as such Mayor do hereby give public notice to the electors and legal voters of the City of Omaha that a general election will be held in said City on Tuesday, the 6th day of March, 1900, for the purpose of electing a Mayor, City Clerk, Treasurer, Comptroller, Tax Commissioner and nine Councilmen, in accordance with an act of the legislature of the State of Nebraska incorporating metropolitan cities, etc., approved March 15th, 1897, and amendments thereto.

I do further give public notice and proclaim that at said election the following question and proposition regarding the issue of bonds of the City of Omaha will be submitted to said electors and legal voters, to-wit:

197 Question and Proposition of Issuing Water Works Bonds.

"Shall the bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars be issued for the purpose of the appropriation or purchase of water works or land therefor, the said bonds to be called 'Water Works Bonds of the City of Omaha', the same to be issued in the denomination of one thousand (\$1,000) dollars each, at such times and in such amounts as may be necessary for such purpose, and to run for twenty (20) years from the date of issue thereof, and to bear interest payable semi-annually at a rate not exceeding four per cent per annum, with interest coupons attached, payable at the fiscal agency of the State of Nebraska in New York City, and not to be sold for less than par, the proceeds thereof to be used for no other purpose than for the appropriation or purchase of water works or land therefor?"

The said question and proposition shall be submitted to said electors entire in the proper form provided by law for official ballots, with the words "Yes", "No", printed thereon. All of said ballots having an "X" mark following the word "Yes", shall be counted in favor of issuing said bonds, and all of said ballots having an "X" mark following the word "No" shall be counted and considered as against the issuing of said bonds.

I do further give public notice and proclaim that at said election the following question and proposition regarding the issue of bonds

of the City of Omaha will be submitted to said electors and legal voters, to-wit:

Question and Proposition of Issuing Paving Bonds.

"Shall bonds of the City of Omaha in the sum of twenty-five thousand Dollars (\$25,000) be issued during the year 1900 for the purpose of paying the cost of paving, repaving or macadamizing the intersections of streets, and ~~across~~ opposite alleys in the City of Omaha and in front of real estate not subject to assessment of special taxes for paving purposes, said bonds to run for twenty (20) years from the date thereof and to bear interest payable semi-annually at a rate of interest not to exceed four (4) per cent per annum, with coupons attached to be called 'Paving Bonds,' and the said bonds not to be sold for less than par?"

The said question and proposition shall be submitted to said electors entire in the proper form provided by law for official ballots, with the words "Yes", "No", printed thereon. All of said ballots

198 having an "X" mark following the word "Yes" shall be counted in favor of issuing said bonds, and all of said ballots having an "X" mark following the word "No" shall be counted and considered as against the issuing of said bonds.

I do further give public notice and proclaim that at said election the following question and proposition regarding the issue of bonds of the City of Omaha will be submitted to said electors and legal voters, to-wit:

Question and Proposition of Issuing Sewer Bonds.

"Shall bonds of the City of Omaha in the sum of seventy-five thousand dollars (\$75,000) be issued during the year 1900 for the purpose of paying the cost of construction and maintenance of main sewers in the City of Omaha, said bonds to run twenty (20) years from the date thereof and to bear interest, payable semi-annually at a rate of interest not exceeding four (4) per cent. per annum, with coupons attached, to be called 'Sewer Bonds,' the said bonds not to be sold for less than par?"

The said question and proposition shall be submitted to said electors entire in the proper form provided by law for official ballots, with the words "Yes," "No," printed thereon. All of said ballots having an "X" mark following the word "Yes" shall be counted in favor of issuing said bonds, and all of said ballots having an "X" mark following the word "No" shall be counted and considered as against the issuing of said bonds.

The polls shall be open on the day of said election at eight o'clock in the morning, and shall continue open until six o'clock in the evening of the same day, at the respective voting places following, to-wit:

City of Omaha, First Ward.

First District, 1013 S. 11th Street, Store.

Second District, 1704 S. 10th Street, Store.

Third District, 2605 S. 13th Street, Butcher Shop.

Fourth District, 1122 S. 7th Street, Store.
 Fifth District, 1703 S. 10th Street, rear.
 Sixth District, 2545 S. 10th Street, Carriage Room.
 Seventh District, 1201 S. 6th Street, rear Butcher Shop.
 Eighth District, 1715 S. 5th Street, Dwelling House.

Second Ward.

First District, 1519 Leavenworth Street, Store.
 Second District, 847 South 19th Street, Store.
 Third District, 2121 Leavenworth Street, Store.
 Fourth District, 1422 William Street, Store.
 Fifth District, 1443 S. 16th Street, Store.
 199 Sixth District, 1424 S. 16th Street, Store.
 Seventh District, 2204. 16th Street, Barber Shop.
 Eighth District, 2332 S. 20th Street, Store.
 Ninth District, 1314 Valley Street, Cottage.
 Tenth District, 1708 Vinton Street, Store.
 Eleventh District, 2307 Vinton Street, Dwelling House.

Third Ward.

First District, 1417 Jackson Street, Store.
 Second District, 1310½ Harney Street, Store.
 Third District, 1405 Capitol Avenue, Store.
 Fourth District, 1515 Chicago Street, Basement Midland Hotel.
 Fifth District, 1519 Webster Street, Store.
 Sixth District, 607 S. 13th Street, Store.
 Seventh District, 309 S. 12th Street, Store.
 Eighth District, 1120 Capitol Avenue, Barber Shop.
 Ninth District, 1203 Chicago Street, Office.
 Tenth District, 301 S. 9th Street, Henderson Hotel.

Fourth Ward.

First District, 1610 Capitol Avenue, Store.
 Second District, 2307 Davenport Street, S. E. Corner.
 Third District, 2416 Davenport Street, Barber Shop.
 Fourth District, 315 S. 28th Street, Office.
 Fifth District, 1712 Farnam Street, Bee Building.
 Sixth District, 422 S. 18th Street, Doran House.
 Seventh District, 1754 Leavenworth Street, Store.
 Eighth District, 318 South 20th Street, Store.
 Ninth District, Carriage room, Dewey Avenue, between 25th Ave.
 and 26th St., north side.

Fifth Ward.

First District, 3801 Sherman Avenue, Office.
 Second District, 2825 Sherman Avenue, Store.
 Third District, 2612 Sherman Avenue, Store.
 Fourth District, 1804 Sherman Avenue, Store.
 Fifth District, 2223 N. 20th Street, Store.
 Sixth District, 1136 N. 18th Street, Store.
 Seventh District, 1718 Nicholas Street, Store.

Sixth Ward.

- First District, N. W. Corner 30th and Ames Avenue, Store.
Second District, 4719 N. 40th Street, Dwelling House.
Third District, 1810 Military Avenue, Store.
Fourth District, 3704 N. 30th Street, Store.
Fifth District, 3212 N. 24th Street, Store.
Sixth District, Rear, 2901 N. 30th Street, Dwelling House.
200 Seventh District, 1910 N. 33rd Street, Laundry.
Eighth District, 2220 N. 27th Street, rear, Butcher Shop.
Ninth District, 2625 Franklin Street, Dwelling House.
Tenth District, 2307 North 24th Street, Store, Idlewild Hall Building.
Eleventh District, 1816 North 24th Street, Store.

Seventh Ward.

- First District, 2719 Leavenworth Street, Store.
Second District, 1312 S. 29th Avenue, Store.
Third District, 3404 Lincoln Avenue, Store.
Fourth District, 2322 S. 29th Street, Barber Shop.
Fifth District, Booth, N. E. Corner 29th and Hickory.
Sixth District, Booth, N. E. Corner 29th and Poppleton Avenue.

Eighth Ward.

- First District, 1306 N. 24th Street, Store.
Second District, 2904 Hamilton Street, Store.
Third District, 2607 Cass Street, Cottage.
Fourth District, 2558 Cuming Street, Store.
Fifth District, 2123 Cuming Street, Office.
Sixth District, Rear 2024 Chicago Street, Carriage room.
Seventh District, 1722 Cuming Street, Blacksmith Shop.
Eighth District, 1623 California Street, Dwelling house, rear.

Ninth Ward.

- First District, 3013 Cuming Street, Store.
Second District, 4016 Cuming Street, Carriage room, rear.
Third District, 4016 Farnam Street, Carriage room, rear.
Fourth District, 3304 Davenport Street, Carriage room rear.
Fifth District, 2866 Farnam Street, Store.
Sixth District, N. W. Corner 29th Avenue and Leavenworth Street, Store.

In Witness whereof I have hereunto set my hand as Mayor of said City of Omaha this 10th day of February, 1900.

[SEAL.]

FRANK E. MOORES, *Mayor.*

Attest:

BEECHER HIGBY,
City Clerk.

I hereby certify that the foregoing is a true and correct copy of the original document now on file in the City Clerk's office.

[SEAL.]

DAN B. BUTLER,

City Clerk.

Endorsed on the back: W. H. Bee. About the City. Feb'y 13, 1900. Election Proclamation. City Election, M'ch 6, 1900.

201

EXHIBIT 11. F. M. H. 2-26-07.

Record of City Council, Journal A-45.

COUNCIL CHAMBER, *March 8th, 1900.*

Meeting of the City Council in accordance with Section 11 of the Charter of 1897 for Metropolitan Cities, for the purpose of canvassing returns of the election held March 6th, 1900.

Council called to order, Thursday, M'ch 8th, 1900, at 8 o'clock P. M., by President Bingham.

798.

Present: Burkley, Lobeck, Mercer, Mount, Mr. President, 5.

Absent: Bechel, Burmester, Karr, Stuht, 4.

Quorum present.

799.

The President called Mr. Mount to the Chair.

800.

Motion by Mr. Bingham that one from each of the Republican, Democrat and Silver Republican parties be appointed to act as Board of Canvassers.

801.

Motion by Mr. Bingham that Fred Bruning act as one of the canvassers, as a Republican.

Carried.

Yeas: Burkley, Lobeck, Mercer, Mount, Mr. President, 5.

Nays: 0.

Absent: Bechel, Burmester, Karr, Stuht, 4.

802.

Motion by Mr. Burkley that Otto Bauman act as one of the canvassers as a Democrat.

Carried:

Yeas: Burkley, Lobeck, Mercer, Mount, Mr. President, 5.

Nays: 0.

Absent: Bechel, Burmester, Karr, Stuht, 4.

803.

Motion by Mr. Lobeck, that James Connell act as one of the Canvassers as a Silver Republican.

Carried:

180

THE CITY OF OMAHA VS. OMAHA WATER CO.

202 Yeas: Burkley, Lobeck, Mercer, Mount, Mr. President, 5.
Nays: 0.

Absent: Bechel, Burmester, Karr, Stuht, 4.

803½.

City Clerk Higby administered the following oath to Canvassers Bruning, Bauman and Connell.

STATE OF NEBRASKA,

County of Douglas, City of Omaha, ss:

We, Fred Bruning, Otto J. Bauman and James Connell do solemnly swear that we will support the Constitution of the United States and the Constitution of the State of Nebraska; and that we will honestly, faithfully and impartially perform and discharge our duties as Canvassers of the Election Returns of the General City Election held on Tuesday, March 6, 1900, according to law and to the best of our ability, so help us God.

FRED BRUNING.
OTTO J. BAUMAN.
JAMES CONNELL.

Subscribed in my presence and sworn to before me this 8th day of March, 1900.

[SEAL.]

BEECHER HIGBY,
City Clerk.

On File.

Councilmen Karr and Stuht take their seats.

804.

Motion by Mr. Bingham, that the Council take a recess until 9 o'clock to-morrow morning.

Carried.

Council called to order from recess at 9 o'clock A. M. March 9th, 1900, By Chairman Mount.

805.

Present: Burkley, Karr, Lobeck, Mount, Mr. President, 5.

Absent: Bechel, Burmester, Mercer, Stuht, 4.

Quorum present.

806.

Motion by Mr. Bingham, that the Council as a Canvassing Board, take a recess until 1 o'clock P. M.

Carried.

203 Council called to order from recess at 1 o'clock P. M. by Chairman Mount.

807.

Present: Burkley, Karr, Lobeck, Mount, Mr. President, 5.

Absent: Bechel, Burmester, Mercer, Stuht, 4.

Quorum present.

President Bingham presides.

808.

To the President and Members of the City Council, Omaha, Nebraska.

GENTLEMEN: The Canvassing Board, appointed by your Honorable Body, in connection with the City Clerk, have completed the canvass and respectfully report the following:

Mr. PRESIDENT: The undersigned, Beecher Higby, City Clerk and Fred Bruning, Otto Bauman and James Connell, three disinterested electors of the City of Omaha, appointed by the Council to canvass the returns of the votes cast at the election held on Tuesday, March 6, 1900, for Mayor, City Clerk, City Treasurer, City Comptroller, Tax Commissioner and nine Councilmen, and the questions submitted to the vote of the people, "Shall the bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars be issued for the purpose of appropriation or purchase of water works or land therefor, the said bonds to be called 'Water Works Bonds of the City of Omaha,' the same to be issued in the denomination of one thousand (\$1,000) dollars each, at such times and in such amounts as may be necessary for such purpose, and to run for twenty (20) years from the date of issue thereof, and to bear interest payable semi-annually at a rate not exceeding 4 per cent per annum, with interest coupons attached, payable at the Fiscal Agency of the State of Nebraska in New York City, and not to be sold for less than par, the proceeds thereof to be used for no other purpose than for the appropriation or purchase of water works or land therefor?"

"Question submitted to the vote of the people:

"Shall bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars be issued for the purpose of the appropriation or purchase of water works or land therefor, the said bonds to be called 'Water Works Bonds of the City of Omaha,' the same to be issued in the denomination of one thousand (\$1,000) dollars each, at such time and in such amounts as may be necessary for such purpose, and to run for twenty (20) years from the date of issue thereof, and to bear interest payable semi-annually at a rate not exceeding 4 per cent per annum, with interest coupons attached, payable at the Fiscal Agency of the State of Nebraska in New York City, and not — be sold for less than par, the proceeds therefor to be used for no other purpose than for the appropriation or purchase of water works or land therefor?"

Yes, 11,516.

No, 2,631.

* * * All of which is respectfully submitted.

Omaha, Nebraska, March 9, 1900.

BEECHER HIGBY,

City Clerk.

FRED BRUNING,

O. J. BAUMAN,

JAMES CONNELL.

Motion by Mr. Mount that the report be adopted.

Reported adopted.

Yeas: Burkley, Karr, Lobeck, Mount, Mr. President, 5.

Nays: 0.

Absent: Bechel, Burmester, Mercer, Stuht, 4.

809.

Proclamation.

* * * As President of the City Council of the City of Omaha, I hereby declare that the following question and proposition regarding the issue of Water Works Bonds of the City of Omaha has been duly carried, to-wit:

"Shall the bonds of the City of Omaha in the sum of three million (\$3,000,000) dollars be issued for the purpose of the appropriation or purchase of water works or land therefor, the said bonds to be called 'Water Works Bonds of the City of Omaha,' the same to be issued in the denomination of one thousand (\$1,000) dollars each, at such times and in such amounts as may be necessary for such purpose, and to run for twenty (20) years from the date of issue thereof and to bear interest payable semi-annually at a rate not exceeding four (4) per cent per annum, with coupons attached, payable at the Fiscal Agency of the State of Nebraska in New York City, and not to be sold for less than par, the proceeds thereof to be used for no other purpose than for the appropriation or purchase of water works or land therefor?" * * *

And I declare that the issuance of all of said bonds has been duly authorized by the required vote of the legal electors of the City of Omaha.

W. W. BINGHAM,
President of City Council.

March 9th, 1900.

Omaha, Neb.

On file.

On motion by Mr. Burkley Council adjourned.

Attest:

BEECHER HIGBY,
City Clerk.

I hereby certify that the proceedings of the City Council of this meeting were posted in the rotunda of the City Hall on Monday, March 12th, 1900.

Expiration of posting M'ch 22, 1900.

BEECHER HIGBY,
City Clerk.

Witness:

E. T. DUKE.

S. SIMONSON.

I hereby certify that the foregoing is a true and correct copy of the original document now in file in the City Clerk's office.

[SEAL.]

DAN. B. BUTLER,
City Clerk.

Endorsed on back: Copy No. —. From the records of the City Council of the City of Omaha, In re. to the canvassing of the vote for \$3,000,000 bonds for Water Works, as of March 8, 1900, and the election of March 6, 1900.

ZZ-2.

Copy.

"The president reported that it was possible that the appraisal of the company's works might soon be completed and the report thereon made and delivered, and submitted a form of proposed demand, prepared by counsel of the company, on the City of Omaha for payment of the amount of the purchase price, and a form of proposed deed, prepared by counsel of the company, to be tendered to the city, in connection with the demand of payment, which demand and deed were read and copies directed to be filed.

On motion duly seconded, it was unanimously

Resolved that the president of the Omaha Water Company
206 is hereby authorized, upon completion of the pending appraisal of the system of water works operated by the Omaha Water Company, to make a demand upon the city substantially in the form now submitted, or in such other form as shall be approved by counsel of the company, for payment of the amount of the appraisal as the purchase price for said system of water works, and to tender to said city a deed in the form now submitted, or in such other form as shall be approved by counsel of the company, of the system of water works operated by the Omaha Water Company, and

Resolved that upon the refusal or failure of the City of Omaha to make payment of the amount of the appraisal of the system of water works operated by the Omaha Water Company upon demand of payment and tender of a deed of said system of water works, the president, vice president and general manager of the Omaha Water Company are hereby severally authorized to begin in the Circuit Court of the United States, for the District of Nebraska, a suit by the Omaha Water Company against the City of Omaha for the specific performance of its contract to purchase."

I, Cortlandt S. Van Rensselaer, Secretary of a meeting of the Board of Directors of the Omaha Water Company, held June 14, 1906, hereby certify that the foregoing is a true extract from the minutes of the meeting, and that the foregoing resolutions were duly adopted at said meeting.

Witness my hand this fourteenth day of June, 1906.

(Signed)

CORTLANDT S. VAN RENSSELAER,

[SEAL.]

Secretary pro tem.

UNITED STATES OF AMERICA, *District of Nebraska.*

STATE OF NEBRASKA,
County of Douglas, ss:

I, May H. Finley, Examiner in Chancery of the United States Circuit Court for the District of Nebraska, do hereby certify that the foregoing testimony in the above entitled case was taken before me at the times and places in the record thereof indicated; that before testifying, each of the several witnesses was by me severally and duly sworn to tell the truth, the whole truth and nothing but the truth; that said testimony was taken in short-hand, and by consent of the parties the signatures of the respective witnesses to their extended depositions was waived.

MAY H. FINLEY,
*Examiner in Chancery of the United States
Circuit — for the District of Nebraska.*

207 Endorsed: Filed May 13, 1907. Geo. H. Thummel,
 Clerk.

Thereupon afterwards, to-wit: At the April 1907 Term of said Court and on the 13th day of May, 1907, the following proceedings were had and done in said case, as appear of record in Journal No. "6" of said Court, to-wit:

OMAHA WATER COMPANY

VS.

CITY OF OMAHA.

This day came the parties herein by their Solicitors, and this cause came on to be heard by the Court on the pleadings and evidence and the arguments of Counsel; and said arguments not being concluded at the hour of adjournment, it is

Ordered that further proceedings herein be and they hereby are postponed until tomorrow morning at 9:30 o'clock.

Thereupon afterwards, to-wit: At the April 1907 Term of said Court and on the 14th day of May, 1907, the following proceedings were had and done in said case, as appear of record in Journal No. "6" of said Court, to-wit:

OMAHA WATER COMPANY

VS.

CITY OF OMAHA.

This day again came the parties herein by their Solicitors and the trial to the Court proceeds, and the arguments of the respective Solicitors not being concluded at the hour of adjournment, it is

Ordered that further proceedings herein be and they hereby are postponed until tomorrow morning at 9:30 o'clock.

Thereupon afterwards, to-wit: At the April 1907 Term of said Court and on the 15th day of May, 1907, the following proceedings were had and done in said case, as appear of record in Journal No. "6" of said Court, to-wit:

OMAHA WATER COMPANY

vs.

CITY OF OMAHA.

This day again came the parties herein by their Solicitors and the trial proceeds, and the arguments of the respective Solicitors being concluded, said cause is duly submitted and by the Court taken under advertisement.

Thereupon afterwards, to-wit: On the 4th day of June, 208 1907, Memorandum Opinion was filed in said case, which said Memorandum Opinion is in words and figures following to-wit:

In the Circuit Court of the United States for the District of Nebraska.

74. "X."

OMAHA WATER WORKS COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

Memorandum Opinion.

W. H. MUNGER, D. J.:

This is an action for the specific performance of a contract, whereby the complainant agreed to sell, and the defendant agreed to purchase, the water works of the complainant, at a price to be fixed by appraisers, one appointed by each of the parties, the third appointed by the two thus chosen.

Among the numerous defenses interposed by the City, it will be sufficient to notice but one.

The appraisers, in fixing the value of the plant, awarded something over a half million dollars as the value of the plant as a going concern, in addition to its physical value. In determining the value of the plant, that they had a right to consider it a going concern, I have no doubt. But it appears from the record that, during the progress of the hearing before the board of appraisers, the complainant offered to permit the appraisers to examine and inspect their books and records for their own personal and private information, such books and papers, however, not to be subject to inspection by the defendant or its counsel, nor the contents to be disclosed to them. The inspection by the board of appraisers of the books and records of complainant was objected to by the City, unless the City should have an opportunity to examine them also. After the case

was finally submitted to the board of appraisers, and the argument had, the board of appraisers requested that the books of complainant be forwarded to Cincinnati, for the examination and inspection of the board. Counsel for the City again protested against such examination. The board appointed an auditor to examine and audit the books.

I think it would have been perfectly competent and proper for the board to have employed an auditor to examine books and papers which were properly before the board as evidence, but I am clearly of the opinion that the taking and receiving of evidence, consisting of these books, upon the part of the board of appraisers, without permitting the same to be examined by the defendant city, was such an irregularity as vitiates the award.

209 It is undoubtedly true that the appraisers were selected by the parties because of their skill, experience and knowledge as to the value of water works property, and they undoubtedly had a right in fixing the value to rely to a large extent upon their own personal knowledge and judgment of the value of such matters. But, in the very nature of things, it was necessary for them to take evidence. They could not be expected to make such a personal inspection as would enable them to know the extent of mains and distributing pipes, their dimensions or character. Evidence would necessarily have to be taken upon this point. The value of the water works plant or system, as a going concern, would largely depend upon the number of household connections, income received, etc. This is a matter which would necessarily, it seems to me, be largely determined by evidence, and the books and records of the company would necessarily have a direct and important bearing upon this question. Where appraisers are required to take evidence, and not rely wholly upon their own knowledge and judgment, such evidence should only be taken when an opportunity is given to the respective parties to hear or examine the same. In this case, as stated, not only was the evidence mentioned received by the appraisers without the city having an opportunity to examine or inspect the same, but against the protest of the city unless such examination was afforded it. Undoubtedly, the water company was not required, if they did not see fit, to offer their books as evidence, or permit them to be examined by the appraisers, but when they offered them to be examined by the appraisers it should have been done as any other evidence is offered, so as to afford the opposite party an opportunity to cross examine or controvert.

The award being invalid for this reason, it follows that the relief asked by complainant must be denied. As the case will doubtless be appealed, I do not express my views upon the other questions raised and fully argued.

A decree will be entered, dismissing the action. Counsel for defendant will prepare a decree, submitting it to counsel for the complainant at least fifteen days before presenting it to the court for signature.

Endorsed: Filed June 4, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April 1907 Term of said court, and on the 29th day of June, 1907, the following decree was signed and filed in said case, and duly entered of record in Journal No. "6" of said Court, to-wit:

210

No. 74. Doc. "X."

OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

This cause having come on to be heard before the Court upon the pleadings and the proofs, and after argument by counsel for the respective parties, and the court being fully advised in the premises finds against the complainant and in favor of the defendant, and that the complainant is not entitled to the relief prayed. It is therefore

Ordered, adjudged and decreed that the complainant's bill of complaint be and the same is hereby dismissed at complainant's cost, taxed at — dollars.

To which the defendant duly excepted and had its exception allowed; and thereupon the said complainant, in open court, prayed an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, which was by the Court duly allowed.

W. H. MUNGER, Judge.

Dated June 29th, 1907.

Endorsed: Filed June 29, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 8th day of July, 1907, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:

In the United States Circuit Court for the District of Nebraska.

OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

Assignment of Errors.

Comes now the complainant and files the following assignment of errors upon which it will rely upon its appeal from the decree made by this Honorable Court on the 29th day of June, 1907, in the above entitled cause.

The United States Circuit Court for the District of Nebraska, Omaha Division, which entered the decree of dismissal of the complainant's bill in said cause, erred as follows:

I. In dismissing complainant's bill.

II. In finding against the complainant and in favor of the defendant.

211 III. In finding that the complainant was not entitled to the relief prayed in its complaint.

IV. In not adjudging and decreeing that the complainant was entitled to the relief prayed for in its Bill of Complaint.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court, and prays that such disposition may be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided, and complainant prays a reversal of the decretal order and decree of dismissal made and entered by said court.

R. S. HALL AND
HOWARD MANSFIELD,
Solicitors for Complainant.

Endorsed: Filed Jul. 8, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 8th day of July, 1907, Petition for an Appeal was filed in said case, which said Petition for an Appeal is in words and figures following, to-wit:

In the United States Circuit Court for the District of Nebraska.

No. 74. Doc. "X."

OMAHA WATER COMPANY, Complainant,
vs.
THE CITY OF OMAHA, Defendant.

Petition for an Appeal.

The above named complainant, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 29th day of June, 1907, wherein and whereby it was ordered, adjudged and decreed that the complainant's bill of complaint be dismissed at complainant's cost, does hereby appeal from the said order and decree of June 29, 1907, to the United States Circuit Court of Appeals for the Eighth Circuit for the reason specified in the assignment of errors filed herein and it prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

R. S. HALL,
HOWARD MANSFIELD,
Solicitors for Complainant.

212 Endorsed: Filed July, 8, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: At the April, 1907, Term of this Court and on the 8th day of July, 1907, the following Order was signed and filed in said case and duly entered of record in Journal No. "6" of said Court, to-wit:

No. 74. Doc. "X."

OMAHA WATER COMPANY, Complainant,
vs.
THE CITY OF OMAHA, Defendant.

Order Allowing Appeal.

On motion of Richard S. Hall, Esquire, solicitor and of counsel for complainant, it is

Ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered herein, be and the same hereby is allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, be forthwith transmitted to said United States Circuit Court of Appeals. It is further

Ordered that a bond on appeal be fixed at the sum of \$500, the same to act as a bond for costs.

Dated July 8th, 1907.

W. H. MUNGER, *Judge.*

Endorsed: Filed July 8, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards to-wit: At the April, 1907, Term of this Court and on the 8th day of July, 1907, the following Order was signed and filed in said cause and duly entered of record in Journal No. "6" of said Court, to-wit:

No. 74. Doc. "X."

OMAHA WATER COMPANY, Complainant,
vs.
THE CITY OF OMAHA, Defendant.

Order.

It Is Ordered that the following original exhibits used as evidence in the above entitled action, may be sent up to the United States Circuit Court of Appeals as provided by statute:

Exhibit "6." Statement showing cost of Appraisement to Omaha Water Company.

213 Exhibit "ZZ." Deed of President Woodbury for Water Company tendered to City of Omaha.

Exhibit "A-1100-E." Schedule of pipe line in South Omaha, produced by Mr. Fairfield, but at Mr. Wright's suggestion, not attached.

Exhibits 2-Z, 3-Z, 4-Z, 5-Z. Books showing blue prints, maps, plans, etc., of appraisement.

Exhibits 6-Z, 7-Z, 8-Z, 9-Z, 10-Z. Five volumes of stenographic report, hearing before Board of Appraisers.

Exhibit 1-Z. Map of the system of water works operated by the Omaha Water Company, introduced on examination of E. M. Fairfield.

W. H. MUNGER, *Judge*.

Endorsed: Filed July 8, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 9th day of July, 1907, Bond was filed in said case, which said Bond is in words and figures following, to-wit:

Bond.

U. S. Circuit Court of Appeals.

Know All Men By These Presents: That we, Omaha Water Company, as principal and Stockton Heth as surety, are held and firmly bound unto The City of Omaha in the full and just sum of Five Hundred Dollars to be paid to the said The City of Omaha its heirs, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this ninth day of July in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the April term A. D. 1907, of the Circuit Court of the United States for the District of Nebraska, in a suit depending in said Court between Omaha Water Company, plaintiff, and The City of Omaha, defendant, a decree was rendered against the said Omaha Water Company and the said Omaha Water Company has obtained an allowance of an appeal of the said Court to reverse the decree and judgment in the aforesaid suit, and a citation directed to the said The City of Omaha citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

214 Now the Condition of the above Obligation is such, That if the said Omaha Water Company shall prosecute said appeal to effect, and answer all costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]

OMAHA WATER COMPANY,
By R. S. HALL, *Its Solicitor,*
Principal.

[SEAL.]

[SEAL.]

STOCKTON HETH, *Surety.*

Sealed and delivered in the presence of—

ARTHUR C. WAKELEY.

Approved by W. H. Munger, Judge.

Endorsed: Filed July 9, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 8th day of July, 1907, Citation was duly signed in said case, and returned and filed on the 9th day of July, 1907, with acceptance of service endorsed thereon, the following of which is the original:

Citation.

U. S. C. C. Appeals.

(Appeal.)

THE UNITED STATES OF AMERICA:

To the City of Omaha, Greeting:

You are hereby cited and admonished to be and appear in the United States — Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the Circuit Court for the district of Nebraska, wherein Omaha Water Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, this 8th day of July in the year of our Lord one thousand nine hundred and seven.

W. H. MUNGER,
*United States District Judge
for the District of Nebraska.*

No. 74. Doc. X. United States Circuit Court, District of Nebraska. Omaha Water Co. vs. The City of Omaha. Citation. Service accepted July 8, 1907. Jno. L. Webster, for City of Omaha. Filed July 9, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 23rd day of July, 1907, Deed Farmers' Loan & Trust Company to Omaha Water Co., was filed in said case, which said Deed is in words and figures following, to-wit:

This indenture, made the twenty-third day of July, in the year One Thousand eight hundred and ninety-six, by and between The Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, as Trustee for the holders of bonds and coupons secured by the mortgages made by the American Water Works Company of Illinois to the Farmers' Loan and Trust Company, dated respectively the first day of July, 1887, and the 16th day of January, 1889, who have requested said Farmers' Loan and Trust Company to purchase the property, premises and

franchises hereinafter described, party of the first part, and The Omaha Water Company, a corporation organized and existing under the laws of the State of Maine, party of the second part,

Witnesseth: Whereas, the property, premises and franchises hereinafter described were sold at public auction on the 20th day of May, one thousand, eight hundred and ninety-six, by Elmer S. Dundy Jr., Master in Chancery of the United States Circuit Court for the District of Nebraska, acting in pursuance of the decree of said court, dated June 24th, 1895, as amended by decree of the United States Circuit Court of Appeals for the Eighth Circuit, dated March 16th, 1896, in a certain cause then pending between the Farmers' Loan and Trust Company, complainant, the American Water Works Company, a corporation, organized and existing under the laws of the State of Illinois, the American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, and others, defendants, brought for the foreclosure of certain mortgages made by said American Water Works Company of Illinois to said The Farmers' Loan and Trust Company, as Trustee, dated respectively, the first day of July, 1887, and the 16th day of January, 1889; and

Whereas, in accordance with the terms of said decree, as so amended, said Farmers' Loan and Trust Company, at the request of the holders of more than a majority in amount of the bonds secured by said mortgages, bid for and purchased, on the behalf and for the benefit of said bondholders, said property, premises and franchises so sold; and

216 Whereas, on report of said sale to the Circuit Court of the United States for the District of Nebraska, an order was made on the 27th day of May, 1886, confirming said sale and directing said Master to deliver a deed of said property, premises and franchises; and

Whereas, said Master has made and delivered such deed, under date of July sixteenth, 1896, to the Farmers' Loan and Trust Company, as Trustee for the holders of bonds and coupons secured by the mortgages made by the American Water Works Company of Illinois to the Farmers' Loan and Trust Company, dated respectively the first day of July, 1887, and the 16th day of January, 1889, who have requested the said Farmers' Loan and Trust Company to purchase said property, premises and franchises; and

Whereas, said bondholders have duly directed said property, premises and franchises to be conveyed to the party of the second part:

Now this indenture witnesseth, that the said party of the first part, in consideration of one dollar and of other good and valuable considerations, the receipt whereof is hereby acknowledged hath granted, bargained, sold, released, remised, enfeoffed, confirmed and conveyed, and by these premises doth grant, bargain, sell, release remise, enfeoff, confirm and convey unto the said The Omaha Water Company party of the second part, all the property, premises, and franchises mentioned in said decree of June 24th, 1895, and in said deed of July 16th, 1896, and therein described as follows, to-wit:

Al those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way to the North line of Washington Street in said city; thence easterly along the north line of said Washington Street to the east line of Mill Street in said city; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258)

in said city; thence easterly along the north line of said 217 Block Two Hundred and Fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

And that other piece or parcel of land in said City of Florence known and described as Blocks Number Two (2), One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also that other piece or parcel of land known and described as the north fifty (50) feet of Lot eighteen (18) and the west ten (10) feet of the north fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B, in Reservoir Addition to the said City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q, and lots one (1) Two (2) Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south

line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) 218 of Kountze's and Ruth's Addition to the City of Omaha, according to a plat of said Addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one half of the northeast one quarter of section (7) in township fifteen (15) north of Range Thirteen (13) east of the Sixth Principal Meridian. And all other land in the County of Douglas and State of Nebraska, and all the right, title and interest therein, whereof the American Water Works Company of Illinois and the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled "An Ordinance to authorize and procure the construction and maintainance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said city, amendatory thereof and supplementary thereto and also under a certain contract bearing date the 20th day of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an Ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the city of South Omaha, Douglas County, Nebraska, for the sale of Water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha; and approved by the Mayor of said city on the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof

219 between said city and said company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all the machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the city of Omaha, the city of South Omaha and the city of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become vested in the purchaser at the sale hereinbefore provided for.

All of above described property situated in Douglas County, State and District of Nebraska."

To Have and to Hold all and singular the above described property, premises and franchises hereby conveyed or intended so to be, unto the said party of the second part, its successors, legal representatives and assigns forever.

In Witness Whereof, the said party of the first part has caused its corporate seal to be hereto affixed and attested by its Secretary and this instrument to be signed by its President, or Vice-President, the day and year first herein written.

THE FARMERS' LOAN AND TRUST
COMPANY, As Trustee,

[SEAL.] By R. G. ROLSTON, President.

In the presence of
W. B. CARDOZO, Witness.

Attest:
SAM SLOAN, JR.,
Asst. Secretary.

STATE OF NEW YORK,
City and County of New York, ss:

On this twenty-fourth day of July, 1896, before me, a Notary Public of the State of New York, in and for the County of New York, personally appeared Roswell G. Rolston, the President of The Farmers' Loan and Trust Company, one of the corporations described in and which has executed the foregoing instrument, and to me personally known to be the identical person whose name is affixed to said instrument as such President, and acknowledged said instrument to be the voluntary act and deed of said corporation, and he being by me duly sworn did depose and say: That he resides at Babylon, New York, and is the President of said Farmers' Loan and Trust Company, and knows the corporate seal of said corporation and that the seal affixed to the foregoing instrument is such corporate seal and was thereto affixed by authority of the Board of Directors of said corporation, and as the voluntary act and deed of said corporation for the purposes expressed in said instrument, and that he also signed his name to said instrument as President of said corporation by the like authority and further as the voluntary act and deed of said corporation.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the City of New York, in the County and State of New York, on the day last herein written.

[SEAL.]

W. B. CARDOZO,
Notary Public, No. 18, New York County.

Form 1.

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a court of Record, do hereby Certify, That W. B. Cardozo, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon
 221 written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 25 day of July, 1896.

[SEAL.]

HENRY D. PURROY, *Clerk.*

Endorsed: Filed July 23, 1907. Geo. H. Thummel, Clerk.

Endorsed: 74 "X." Deed. Farmers' Loan and Trust Co., Tr., to The Omaha Water Co.

THE STATE OF NEBRASKA,
Douglas County, ss:

Entered on Numerical Index and filed for record in the Register of Deeds' Office of said County, the 28th day of July, 1896, at 2:50 o'clock P. M., and recorded in Book 203 of Deeds page 537.

PETER E. ELSASSER,
Register of Deeds.

Filed Jul- 23, 1907.

GEO. H. THUMMEL, *Clerk.*

Thereupon afterwards, to-wit: On the 24th day of July, 1907, Certified Copy of Mortgage of the Omaha Water Company to Guaranty Trust Company of New York, dated July 23, 1896, offered in evidence was filed in said case, which said certified copy of mortgage is in words and figures following, to-wit:

The Omaha Water Company
to
Guaranty Trust Company of New York.

Copy.

Prior Lien Mortgage.

Dated July 23d, 1896.
Compared.

The Omaha Water Company Prior Lien Mortgage.

This Indenture, made on the 23d day of July, in the year one thousand eight hundred and ninety-six, between The Omaha Water Company, a corporation of the State of Maine, hereinafter
222 called the Water Company, of the first part, and the Guaranty Trust Company of New York, a corporation of the state of New York, hereinafter called the Trustee, of the second part, Witnesseth:

Whereas, The Water Company is a corporation duly formed under the laws of the State of Maine and authorized to acquire, enlarge, maintain and operate water works in Douglas County and elsewhere in the state of Nebraska and to supply the City of Omaha, the City of South Omaha and the City of Florence and other cities and places in the State of Nebraska, and the citizens and inhabitants thereof, with water for domestic, mechanical, public and fire purposes, with power to acquire, hold, lease and convey real estate suitable for the business of the corporation, and with the right to issue bonds and secure the same by mortgage of its franchises, rights, contracts and properties for its corporate purposes; and

Whereas, The Water Company has acquired the water works and other property hereinafter described, formerly owned or held by the American Water Works Company of Illinois and the American Water Works Company of New Jersey, and sold under foreclosure

of the mortgage of the former company, dated July 1, 1887, and its supplemental mortgage, dated January 16, 1889, pursuant to decrees of the Circuit Court of the United States for the District of Nebraska and the United States Circuit Court of Appeals for the Eighth Circuit; and

Whereas, the Water Company is indebted for the property so acquired, and it is necessary for the Water Company, for the purpose of paying its indebtedness, and for the transaction of its business and the exercise of its corporate rights, privileges and franchises to borrow money, and to issue and dispose of its bonds for the amount so borrowed, and to mortgage its franchises, rights, contracts and properties to secure the payment of such bonds; and

Whereas, The Water Company has been authorized by vote of its stockholders and its Board of Directors to borrow the money necessary for the purposes aforesaid and to issue for a part of the money so borrowed its bonds to the amount of one million five hundred thousand dollars payable in gold coin of the United States of America of the present standard, or in its equivalent on the first day of July, 1916, and bearing interest from the first day of July, 1896, at the rate of five per cent per annum, payable in like coin on the first day of January, and the first day of July in each year, until the principal sum is paid, and to be redeemable at any time at one hundred and five per cent and accrued interest; such bonds to be registered bonds, each for ten thousand dollars or some multiple thereof, or coupon bonds for one thousand dollars each having interest coupons annexed with the engraved facsimile of the signature of the treasurer of the Water Company; for an equal amount of which coupon bonds such registered bonds are to be exchangeable; all of said bonds to be sealed with the corporate seal of the Water Company, attested by its secretary and to be signed for the Water Company by its President; and

Whereas, the stockholders of the Water Company and its Board of Directors have, for the purpose of securing the payment equally of all of said bonds and the interest thereon, authorized and directed the execution of this mortgage to the Trustee, under date of July 23d, 1896, mortgaging the franchises of the Water Company and its water works and other property hereinafter described; and

Whereas, the said stockholders and Board of Directors have authorized and directed that said bonds and coupons and the certificates of the Trustee be substantially in form as follows:

(Form of Prior Lien Registered Bonds.)

UNITED STATES OF AMERICA,
STATE OF MAINE.

The Omaha Water Company.

Prior Lien Mortgage Five per Cent. Gold Bond.

No. A —.

\$—.

For value received the Omaha Water Company promises to pay to ———, or assigns, ——— thousand dollars, on the first day of July, 1916, and to pay interest on said sum from the first day of July, 1896, at the rate of five per cent per annum, on the first day of January and the first day of July in each year, and until said principal sum is paid; both principal and interest being payable in gold coin of the United States of America of the present standard, or in its equivalent, at the office of the Guaranty Trust Company of New York or other agency of said Water Company in the City of New York, without deduction from principal or interest for any tax which said Water Company may be required by any present or future federal or State law to pay thereon or retain therefrom.

This bond is one of an issue of bonds of like tenor and date limited to the aggregate amount of one million five hundred thousand dollars, all of which are equally secured by, and are subject to, the terms of a prior lien mortgage or deed of trust, dated July 23rd, 1896, duly executed and delivered by the Omaha Water Company 224 to the Guaranty Trust Company of New York as trustee mortgaging the franchises of said Water Company and its water works in Douglas County, Nebraska, and its other property described in said mortgage.

Under certain conditions the principal of all the bonds issued under said mortgage may become due and payable before maturity, as provided in the mortgage.

This bond is transferable only on the books of said Water Company at its office or agency in the city of New York, by the registered owner in person or by attorney, upon surrender hereof.

This bond is redeemable at any time by said Water Company at one hundred and five per cent, and accrued interest, as provided in said mortgage.

This bond may be exchanged at any time before maturity, at the option of the registered owner or on demand of the Water Company, for a like amount of coupon bonds of the same issue secured by said mortgage, but of the denomination of one thousand dollars each.

This bond shall be valid only when authenticated by the certificate hereon of the trustee of the mortgage herein described to the effect that it is one of the issue of bonds mentioned in said mortgage.

In Witness Whereof, the said Water Company has caused its cor-

porate seal to be hereto affixed, and attested by its secretary, and this bond to be signed by its President, the — day of —, 189—.

THE OMAHA WATER COMPANY,
By — —, *President*.

Attest:

— —, *Secretary*.

(Form of Trustee's Certificate.)

Guaranty Trust Company of New York, as trustee, hereby certifies that this bond is one of the issue of bonds mentioned in the mortgage therein described.

GUARANTY TRUST COMPANY
OF NEW YORK,
By — —, *President*.

225

(Form of Prior Lien Coupon Bond.)

UNITED STATES OF AMERICA,
STATE OF MAINE.

The Omaha Water Company.

Prior Lien Mortgage Five per Cent. Gold Bond.

No. —.

\$1,000.

For value received The Omaha Water Company promises to pay to the bearer or registered holder of this bond One Thousand Dollars on the first day of July, 1906, and to pay interest on said sum from the first day of July, 1896, at the rate of five per cent per annum, on the first day of January and the first day of July in each year, upon presentation and surrender of the proper coupon hereto annexed, and until said principal sum is paid; both principal and interest being payable in gold coin of the United States of America of the present standard or in its equivalent, at the office of the Guaranty Trust Company of New York or other agency of said Water Company in the City of New York, without deduction from principal or interest for any tax which said Water Company may be required by any present or future federal or state law to pay thereon or retain therefrom.

This bond is one of an issue of bonds, of like amount, tenor and date, limited to the aggregate amount of one million five hundred thousand dollars, numbered from one to fifteen hundred, both included, all of which are equally secured by, and are subject to, the terms of a prior lien mortgage or deed of trust, dated July 23rd, 1896, duly executed and delivered by The Omaha Water Company, to the Guaranty Trust Company of New York, as trustee, mortgaging the franchises of said Water Company and its water works

in Douglas County, Nebraska, and its other property described in said mortgage.

Under certain conditions the principal of all the bonds issued under said mortgage may become due and payable before maturity, as provided in the mortgage.

This bond may be registered on the bond transfer books of said Water Company, at its office or agency in the city of New York, and after registration certified hereon by the bond transfer agent of said Water Company, no transfer of this bond, except on said books,

shall be valid until after registered transfer to bearer, when
226 this bond shall again become transferable by delivery and remain subject to successive registrations and transfers. The coupons annexed to this bond shall always be transferable by delivery.

This bond is redeemable at any time by said Water Company at one hundred and five per cent and accrued interest as provided in said mortgage.

This bond shall be valid only when authenticated by the certificate hereon of the trustee of the mortgage herein described to the effect that it is one of the issue of bonds mentioned by said mortgage.

In Witness Whereof, the said Water Company has caused its corporate seal to be hereto affixed, and attested by its Secretary, and this bond to be signed by its president, and has hereto annexed coupons with the fac simile signature of its treasurer thereon, as of the 23rd day of July, 1896.

THE OMAHA WATER COMPANY,

By ———, *President.*

Attest:

———, *Secretary.*

(*Form of Coupon.*)

The Omaha Water Company will pay to the bearer on the first day of — at its agency in the City of New York, twenty-five dollars, being six months' interest then due on its prior lien mortgage gold bond, No. —.

———, *Treasurer.*

(*Form of Trustee's Certificate.*)

Guaranty Trust Company of New York, as Trustee, hereby certifies that this bond is one of the issue of bonds mentioned in the mortgage therein described.

GUARANTY TRUST COMPANY OF NEW YORK,

By ———, *President.*

Now Therefore, in consideration of the premises and of the agreements hereinafter made, and of one dollar received by the Water Company from the Trustee, and in order to secure the payment of the principal and interest of all the bonds aforesaid at any time out-

standing, the Water Company hereby grants, conveys assigns
 227 and transfers to the Trustee, its successors and assigns, the
 franchises of the Water Company and its water works and
 other property described as follows:

All those several pieces and parcels of land known and described
 as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri river with the south line of Bridge street in the city of Florence Douglas County, Nebraska, and running thence westerly along the south line of said Bridge street to the east line of Fifth street in said city; thence southerly along the east line of said Fifth street to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly along the east line of said right of way to the south line of State street in said city thence easterly along the south line of said State street to the east line of said railroad right of way, south of State street; thence southerly along said right of way to the north line of Washington street in said city; thence easterly along the north line of said Washington street to the east line of Mill street in said city; thence northerly along the east line of said Mill street to the northwest corner of Block two hundred and fifty eight (258) in said city; thence easterly along the north line of said Block two hundred and fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River in all its meanderings, to the place of beginning:

Also that other piece or parcel of land in said city of Florence, known and described as Block numbers two (2) one hundred and twenty-six (126) and two hundred and sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County:

Also those parts of Adams, Farnam and Sheffield streets heretofore vacated in said city of Florence, lying between the west line of Water street and the east line of Mill street in said city.

Also that other piece or parcel of land known and described as the north fifty (50) feet of lot eighteen (18) and the west ten (10) feet of the north fifty (50) feet of lot seventeen (17) both in Block two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Register of Deeds of said Douglas County:

Also that other parcel of land known as Lot B in Reservoir Addition to the said city of Omaha, according to the plat of said Addition recorded in the office of the Register of Deeds of said county;

228 Also those other parcels of land known as lots one (1) two (2) three (3) four (4) five (5) six (6) seven (7) and eight (8) in Block Q, and Lots one (1) two (2) five (5) and six (6) in Block three hundred and twenty-eight (328) in the city of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office;

Also that certain other parcel of land in said city of Omaha described as follows;

Beginning at a point on the south line of Burt street, at the north-

east corner of Block three hundred and sixty (360) in said city; thence north to a point corresponding with the south line of the alley in Blocks Three hundred and twenty-eight (328) and three hundred and twenty-nine (329) in said city; thence east to the bank of the Missouri river at low water mark; thence in a southeasterly direction along the bank of the said Missouri river to a point corresponding with the south line of Burt street, produced east from its present termination; thence west to the place of beginning:

Also two other pieces or parcels of land described as follows: Lots seven (7) and ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the city of Omaha, according to the plat of said addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast one-quarter of section seven (7) in township (15) north of Range Thirteen (13) east of the sixth Principal Meridian;

Also all other lands and rights and interests in lands which the Water Company now has in said County of Douglas and State of Nebraska and all which it shall acquire:

Also, all the property, right, title and interest, claims and demands which the Water Company has or shall acquire under or by virtue of a certain ordinance of the city of Omaha, in the State of Nebraska, known as Ordinance 423, entitled, "An Ordinance to Authorize and procure the construction and maintenance of Water Works in the City of Omaha, State of Nebraska, passed by the City Council of said city, and approved by the Mayor thereof, on the 11th day of June 1880" and all other ordinances of said city amendatory thereof or supplemental thereto.

Also all the property, right, title and interest which the Water Company has and all which it shall acquire under or by virtue of a certain contract bearing date the 20th day of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of said Locke under which contract
229 passed to the American Water Works Company of Illinois and were mortgaged by said Company to the Farmers' Loan and Trust Company, Trustee, by a mortgage dated July 1, 1887, and a supplemental mortgage dated January 16, 1889, and were sold on the foreclosure of said mortgages, and were acquired by the Water Company from the purchasers at the foreclosure sale;

Also all the property, right, title and interest which the Water Company has and all which it shall acquire under or by virtue of an ordinance of the Mayor and Council of the City of South Omaha, known as Ordinance No. 29, entitled, "An Ordinance Granting an Exclusive Right to Lay a System of Water Works in the streets and alleys and public places in the city of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes, to the American Water Works Company of Chicago, Illinois, for a term of seventeen years" passed by the Mayor and Council of said city of South Omaha, and approved by the Mayor of said city on the 17th day of October, 1887, and mortgaged by said company as afore-

said, and sold on the foreclosure of said mortgages, and acquired by the Water Company from the purchasers at the foreclosure sale;

Also all the property, right, title and interest which the Water Company has and all which it shall acquire under or by virtue of an ordinance of the City of Florence, entitled "An Ordinance to Procure a Supply of Water for the City of Florence and its Inhabitants for Fire and Domestic purposes, and to contract with the American Water Works Company therefor" passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said city on the 13th of August, 1899, and under and by virtue of the contract in pursuance of said ordinance between said city and said company and mortgaged by said company as aforesaid and sold on foreclosure as aforesaid, and acquired by the Water Company from the purchasers at the foreclosure sale;

Also all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas, in the State of Nebraska;

Also all the right, title and interest which has at any time heretofore been vested in or held or enjoyed by the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them under or by virtue of
230 the several ordinances and contracts aforesaid, or otherwise acquired, held or enjoyed by either of said companies;

Also all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets of the Water Company, and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature, however arising, of the Water Company against the City of Omaha, the City of South Omaha and the City of Florence or any of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing or may at any time hereafter accrue;

Also all the right, title and interest which the Water Company shall at any time acquire under or by virtue of any new ordinance of the City of Omaha or the City of South Omaha, or the City of Florence or any other city or any village of the state of Nebraska, or by virtue of any contract between the Water Works Company and any of said cities or any other city or any village of said state;

Also all other property of whatever description which the Water Company now owns and all which it shall in any way acquire:

Also all franchises and all powers, rights, privileges, immunities and exemptions which the Water Company now has, and all which it shall acquire;

Also all future tolls, revenues, incomes and profits from any of the property and franchises at any time covered by this mortgage;

To have and to hold all the said property and franchises whether now owner or hereafter acquired by the Water Company, unto the Trustee and its successors and assigns in said trust, forever; subject however, to the lien of a certain mortgage, dated August 2d, 1880,

made by the City Water Works Company of Omaha to the Farmers' Loan and Trust Company, Trustee, under which bonds are outstanding to the amount of four hundred thousand dollars, bearing six per cent interest and due August 2d, 1905, and redeemable at par and interest August 2d, 1900; the property and franchises hereby conveyed to be held in trust nevertheless, under the provisions hereinafter set forth, for the benefit of all holders of bonds duly issued under this mortgage and to secure the payment of the principal and interest of all such bonds, according to their terms and the terms of this mortgage, without any preference as to any
231 of said bonds by reason of priority in the time of issue or negotiation or otherwise; provided, however, that if the Water Company shall pay the principal and interest of all of said bonds, according to the terms of the bonds and of this mortgage, and the reasonable compensation and lawful charges of the Trustee, all the estate and interest of the Trustee in said water works and other property and in said franchises, and all lien thereon by reason of this mortgage, shall cease.

It is agreed between the parties hereto and by the Water Company with all who shall hold any of the bonds issued under this mortgage, that the further provisions under which said bonds are to be issued by the Water Company and said mortgaged property and franchises are to be held by the Trustee, are as follows:

First. The Water Company shall forthwith execute all of the bonds provided for by this mortgage, and deliver them to the Trustee. None of said bonds shall be valid until authenticated by the certificate thereon of the Trustee, that said bond is one of the issue of bonds authorized by this mortgage.

The trustee shall retain four hundred and forty of said bonds numbered from one to four hundred and forty, both included and shall from time to time certify and deliver said bonds as directed by resolution of the Board of Directors of the Water Company, at the rate of eleven thousand dollars in amount of said bonds for every ten thousand dollars in amount of the underlying bonds of the City Water Works Company of Omaha, hereinbefore described, as to which the Trustee of the mortgage securing said underlying bonds shall certify that such amount thereof has been redeemed or purchased or that such Trustee has received the money for their redemption.

The trustee shall, from time to time, certify and deliver the remaining bonds secured by this mortgage, to the limit of the bonds authorized and uncanceled, as directed by resolution of the Board of Directors of the Water Company stating that a specified amount of such bonds is required to be used towards payment for the property acquired as set forth in this mortgage and to carry out the plan of reorganization of the Omaha Water Works, dated June 9, 1896, or as directed by resolution of such Board stating that the Water Company is unable to sell its consolidated mortgage bonds for at least ninety per cent of their par value and that a specified amount of bonds secured by this mortgage is required for the enlargement or improvement of the mortgaged property, accompanied by the certifi-

cate of the General Manager and Treasurer of the Water
232 Company that its earnings available for the purpose are sufficient to pay the interest on all the outstanding bonds secured by mortgages on its property and on the amount of bonds so required; all of which bonds so required the Water Company agrees to use exclusively for the purposes so stated.

Whenever the Board of Directors of the Water Company shall, from time to time, by resolution certify that a specified amount of consolidated mortgage bonds of the Water Company has been sold, the Trustee shall forthwith cancel bond authorized by this mortgage and then remaining with the Trustee, at the rate of six thousand dollars in amount of such remaining bonds for every seven thousand dollars in amount of the consolidated mortgage bonds so sold, beginning with the bond bearing the last serial number and cancelling back from such bond.

Compliance with the foregoing directions shall be a full protection to the Trustee in certifying and delivering bonds secured hereby, and the Trustee shall be under no obligation to verify any facts stated or certified as aforesaid.

If any bond issued hereunder shall be mutilated, lost or destroyed, the Water Company may, upon terms and conditions prescribed by its Board of Directors, issue in lieu thereof, a new bond, of like tenor, amount and date, and bearing the same serial number, which bond, when so issued shall be duly certified by the Trustee, upon due proof of such mutilation, loss or destruction, and upon receiving indemnity satisfactory to the Trustee.

Second. The Water Company shall pay the principal of all the bonds duly issued under this mortgage, when the principal shall become due by the terms of the bonds or by redemption or declaration, as hereinafter provided, upon the surrender of the bonds; and it shall pay the interest thereon, according to the terms of the bonds, upon the presentation and surrender of the proper coupons for such interest and until the principal of the bonds is paid, without deduction from principal or interest for any tax which the Water Company may be required by any present or future federal or state law to pay thereon or to retain therefrom.

As the coupons annexed to said bonds are paid, they shall be cancelled, and no purchase of any coupons, nor any advance or loan thereon nor redemption thereof, by or on behalf of the Water Company after the same shall have been detached from the bonds to which they belong, shall keep such coupons alive or preserve their lien upon the mortgaged property or franchises.

233 Third. The Water Company shall keep an agency in the City of New York, while any bonds secured by this mortgage are outstanding, for the payment of the interest and principal of said bonds; and it shall also maintain an agency in said city where it shall keep transfer books on which the bonds shall, upon request of the holder, be registered without expense to the holder. Every registration shall be certified on the bond by the bond transfer agent of the Water Company, after which no transfer of the bond, except on said books, shall be valid, until after registered transfer to bearer,

when the bonds shall again become transferable by delivery, but remain subject to successive registrations and transfers. The coupons annexed to any of such bonds, whether the bond be registered or not, shall always be transferable by delivery.

The Trustee shall have access to all said books at all reasonable times, and upon request in writing, shall have a list of the registration of bonds shown thereon at any date specified.

For the purpose of administering the trust created by this mortgage, the person in whose name any bond is so registered shall be taken to be the owner of the bond.

Fourth. The Water Company may at any time redeem any of the bonds secured by this mortgage at one hundred and five per cent and accrued interest. In order to make redemption, the Water Company shall cause the serial numbers of so many bonds as it shall at any one time propose to redeem to be drawn by a notary public of the City of New York from the serial numbers of all the bonds hereby secured then outstanding. The Water Company shall thereupon publish, at least once a week for four successive weeks, in a newspaper of general circulation published in the City of New York and in a newspaper of general circulation published in the City of Omaha, a notice that such bonds will be redeemed at the agency of the Water Company in the City of New York, at one hundred and five per cent with accrued interest on the next interest day. Further interest upon such bonds shall then cease, if the Water Company shall then have provided at such agency the money for the due redemption thereof.

Fifth. The Water Company, so long as there is no default in the payment of any interest or of the principal of any of the bonds secured by this mortgage, or by said underlying mortgage, or in any of the agreements of the Water Company herein set forth, shall have the possession, operation, management and use of the property and franchises covered by this mortgage, and shall receive the revenues, income and profits thereof, as if this mortgage had not been made.

Sixth. The Water Company, so long as there is no default in the payment of any interest or of the principal of any of the bonds secured by this mortgage, or by said underlying mortgage, or in any of the agreements of the Water Company, herein set forth, shall have the right to sell or otherwise dispose of, free from any lien created by this mortgage, any machinery materials or other movable property which shall become old, worn out or unfit for use or undesirable, or which the Water Company shall not need for the proper conduct of its business; and shall have the right, with the written consent of the Trustee, to sell or otherwise dispose of, with like effect any real estate or any other personal property covered by this mortgage, not needed for the proper conduct of the Water Company's business; the resolution of the Board of Directors of the Water Company, accompanied by the affidavits of its President and General Manager or Chief Engineer, to be sufficient evidence of the Trustee in giving such consent.

The Trustee shall, upon the written request of the Water Com-

pany, join in the conveyance and transfer of any real estate or other property, sold or otherwise disposed of as hereinbefore provided.

All proceeds of real estate or other property sold or disposed of as aforesaid shall forthwith be applied by the Water Company to the replacement of the property so sold, or otherwise for the benefit of the mortgaged property. Any property acquired with the proceeds of any sale of property covered by this mortgage, or substituted therefor, shall be subject to the lien and provisions of this mortgage, and upon the written request of the Trustee, shall be conveyed by the Water Company to the Trustee, to be held upon the trust hereby created.

Seventh. The Water Company shall, subject to the provisions aforesaid, properly maintain and operate all the Water Works owned or controlled by it, and all other property at any time covered by this mortgage, and shall preserve the franchises, rights and privileges relating thereto, repairing renewing and replacing the mortgaged property as may be necessary.

The Water Company shall keep all buildings, furniture, machinery, tools and implements, and other combustible property at any time covered by this mortgage, properly insured against loss or damage by fire. The moneys collected on any policy of insurance shall be promptly applied by the Water Company to the re-
235 placement or reconstruction of the destroyed or damaged property or otherwise for the benefit of the mortgaged property.

Eighth. The Water Company shall pay or cause to be paid when the same shall become due and payable, all taxes, assessments and governmental and other like charges lawfully imposed on any of the property or franchises covered by this mortgage, and shall not suffer any lien superior to the lien of this mortgage to attach to any part of said property or franchises, and shall not commit nor suffer any waste thereof. The Water Company shall pay all taxes which it may be required by any present or future Federal or State law to pay on or retain from the principal or interest of any of the bonds secured by this mortgage.

Should the Water Company fail to pay any such tax, assessment or governmental or other charge, or suffer any such lien to attach to any such property or franchises, the Trustee may pay and discharge the same, but shall be under no obligation to do so.

Ninth. The Water Company, shall repay, on demand, all moneys expended by the Trustee in the payment or discharge of any tax, assessment or other governmental or like charge, or of any lien on any of said property or franchises, and shall pay the Trustee a reasonable compensation for administering the trust created by this mortgage and all charges and expenses, including expenses of attorneys and counsel, properly incurred by the Trustee in connection therewith. Should the Water Company fail to repay such moneys, or to pay such compensation, charges or expenses, the same shall be paid to the Trustee out of the proceeds of any sale of the mortgaged property hereinafter provided for.

Tenth. If default shall be made in the payment of any interest

on any of the bonds secured by this mortgage, or by said underlying mortgage, or in any of the agreements on the part of the Water Company hereunder, and such default shall continue for ninety days after written demand of payment or performance, or if a receiver of the property of the Water Company hereby mortgaged shall be appointed in any proceeding, the principal of all the said bonds then outstanding, with all interest accrued and unpaid thereon, shall become due and payable at the election and upon the declaration of the Trustee, or upon the declaration of the holders of one third in amount of the bonds secured by this mortgage and then outstanding, made as hereinafter provided and filed with the Trustee; but the holders of a majority in amount of the bonds hereby secured may at any time thereafter until the sale of the property and franchises secured by this mortgage, reverse in like manner any such declaration previously made by the Trustee or by bondholders, or, such default or receivership continuing or again happening, such principal may again in like manner as aforesaid be declared to be due; and said principal shall cease to be due or become due accordingly; provided, however, that, in case of any such declaration made by the Trustee, the payment of all interest, taxes or other charges due and the performance of any agreements as to which default shall have been made, shall operate to reverse and avoid such declaration made by the Trustee. But upon any sale of the property and franchises covered by this mortgage, the principal of all the bonds secured hereby and then outstanding shall become due, if not already due by the terms of the bonds or by declaration as herein provided.

Eleventh. If default shall be made in the payment of any interest or of the principal or any of the bonds secured by this mortgage, or in any of the agreements of the Water Company herein set forth, and shall continue for ninety days after written demand of payment or performance, the Trustee shall, upon request made as herein after provided and filed with the Trustee by the holders of one-fifth in amount of the bonds hereby secured and then outstanding, and upon reasonable indemnity, such default continuing, enter upon and take possession of all the water works and other property of the Water Company covered by this mortgage, and operate said works and property and conduct the business of the Water Company pertaining thereto and receive all the revenues, income and profits therefrom, and from the receipts shall pay all expenses of operation and make such repairs, replacements, alterations, additions and improvements to the mortgaged property as the Trustee shall deem needful, and pay all taxes due upon any of the mortgaged property and all interest due on any bonds secured by said underlying mortgage; and shall, after deducting such expenses and retaining a reasonable compensation for its services, apply the net income from said business to the payment of any coupons previously due or becoming due during such possession on bonds secured by this mortgage, ratably, in the order in which such coupons shall have become due, until the principal of said bonds shall become or be declared due; and shall thereafter apply any remainder of said net income to the payment of the

principal of said bonds, with all interest accrued and unpaid thereon, ratably, to the owners of said principal and interest, without discrimination or preference.

If after such entry, all interest due on the bonds secured hereby and then outstanding shall in such manner be fully paid out
237 of the income of said property, and the principal of said bonds shall not be due by the terms of the bonds or by declaration as herein provided, and there shall be no other default on the part of the Water Company under this mortgage, the Trustee shall restore said property to the Water Company but without prejudice to the right of entry for any subsequent default.

Twelfth. In case of like default and upon like request and indemnity, the Trustee shall, either with or without entry, such default continuing, cause all of the property and franchises then covered by this mortgage to be sold as one property at public auction, at the City of Omaha or at such other place as the Trustee may designate, after advertising notice of sale at least once a week for four successive weeks in a newspaper of general circulation published in the city of Omaha, and in a newspaper of general circulation published in the city of New York.

The Trustee may adjourn such sale from time to time in its discretion, without further advertising, and after the sale shall execute, acknowledge and deliver a good and sufficient deed of conveyance of said property, which shall be a bar against the Water Company and all persons claiming under it, with respect to any of the property so sold.

The Trustee shall apply so much of the net proceeds of sale as may be necessary to the payment of the principal and interest then unpaid on the bonds secured hereby and then outstanding, ratably to the holders thereof, without discrimination or preference, and then shall pay over any surplus to the Water Company or to whoever shall be entitled to receive the same.

Thirteenth. The Water Company may by vote of its Board of Directors, waive the provisions hereinbefore contained in regard to continuation of default for ninety days before the principal of the bonds can be declared due or entry or sale made hereunder; and the Trustee and the holders of bonds secured by this mortgage, may, immediately upon the waiver, take any action, which under the terms of this mortgage, they would have the right to take at the expiration of such period.

Fourteenth. The Trustee shall not, however, at any time without request made as hereinafter provided and filed with the Trustee by the holders of [one-fifty] in amount of bonds hereby secured and then outstanding, enter upon or take possession of or sell, under said powers of entry and sale, any of the property covered by this mortgage.

Fifteenth. In case of any default by the Water Company,
238 whether in the payment of the principal or interest of any of the bonds secured by this mortgage, or by said underlying mortgage, or in the performance of any agreement of the Water Company herein set forth, the Trustee may, at any time after such de-

fault, the default continuing, begin foreclosure or other appropriate proceedings in any proper Court, by way of remedy, as the Trustee, being advised by counsel, shall deem most expedient for the interests of the holders of the bonds hereby secured; and the Trustee shall, upon reasonable indemnity at any time after such default; the default continuing, proceed to enforce a remedy by foreclosure or other appropriate proceedings in any proper Court, upon request made as hereinafter provided and filed with the Trustee by the holders of one-fifth in amount of the bonds hereby secured and then outstanding.

Sixteenth. The Water Company shall not, while any bonds secured by this mortgage are outstanding, apply for the appointment of a receiver of any property covered hereby. No holder of bonds secured hereby shall have a right to begin foreclosure or other proceedings, by way of remedy hereunder, until the Trustee shall refuse or neglect to begin the same within a reasonable time after sufficient request made as herein provided and filed with the Trustee, with offer of reasonable indemnity.

Seventeenth. The Water Company hereby irrevocably waives all benefit of any present or future valuation, stay, extension or redemption laws, and hereby irrevocably waives all right to have the mortgaged properties and franchises marshalled upon any sale thereof, and consents that the same be sold as one property.

Eighteenth. In case of a foreclosure or any judicial, or other sale of the property and franchise held in trust under this mortgage, the purchaser, after paying in money enough to cover the costs and expenses of the sale, and of the proceedings relative thereto, and any unpaid charges, expenses or compensation of the Trustee, and such other charges as the Trustee or the Court having jurisdiction of the proceedings may require to be paid in money, may, in completing payments of the purchase price, apply any bonds and coupons secured hereby, then matured and unpaid, counting the same at such sums as would be payable as a dividend thereon out of the net proceeds of such sale upon a due accounting and appointment. But if the amount so payable thereon shall be less than the amount due on said bonds and coupons, the receipt of such amount indorsed
239 thereon shall be sufficient evidence of the application of such amount on such purchase price.

Nineteenth. Any consent, declaration, request or appointment herein provided to be made by bondholders shall be by instrument or similar instruments in writing, signed by the bondholders or by their attorneys duly authorized for the purpose, and proved in each case by the certificate of an officer authorized to take acknowledgements that the persons signing the same acknowledged the execution thereof, and acknowledged before such officer the ownership of the bonds by the person claiming to be owner thereof. Every power under which an attorney shall sign any such instrument must be proved by a like certificate, and be filed with the instrument so signed. The Trustee may, however, require all persons claiming to be owners to produce their bonds, or give other evidence of ownership satisfactory to the Trustee.

The Trustee may at any time call a meeting of the holders of bonds secured hereby for action under the provisions of this mortgage, and shall call such meeting upon the request of holders of not less than one-fifth in amount of said bonds then outstanding; and such holders may themselves call such meeting upon the failure of the Trustee to comply promptly with such request. Every such meeting shall be held in the City of New York, unless otherwise directed by such bondholders.

Twentieth. The Trustee may resign its trust under this mortgage by notice in writing to the Water Company given at least thirty days before the resignation is to take effect.

In case of a vacancy in the office of Trustee, a new Trustee may be appointed by the holders of a majority in amount of the bonds secured hereby and then outstanding, by duplicate instruments of appointment made as hereinbefore provided and filed with the Water Company and the new Trustee, and recorded in the office where this mortgage is recorded. The Water Company may, by instrument of appointment authorized by its Board of Directors, and executed under its corporate seal, and duly acknowledged, and recorded in the offices where this mortgage is recorded, appoint a trustee to fill the vacancy until an appointment shall be so made by bondholders.

If a vacancy in the office of Trustee shall remain unfilled for thirty days, any holder of a bond secured hereby may, on not less than ten days' notice to the water Company, apply to any Court of competent jurisdiction for the appointment of a new Trustee.

240 Every new Trustee, however appointed, shall be a duly incorporated trust company.

Every new Trustee, shall, immediately upon appointment, and by virtue thereof, be vested with all the property and estate, and have all the rights, powers and discretion, then belonging to the Trustee under this mortgage.

The Trustee shall be under no obligation to record this mortgage other than as a mortgage of real estate, or to give notice of this mortgage, or of any assignment effected thereby, to the promisor, obligor or covenantor of any contract or chose in action covered or assigned by said mortgage, or to insure any of the mortgaged property, or to see that the covenants or agreements of the Water Company are performed, until requested thereto, as herein provided, by holders of bonds secured thereby, and reasonable indemnified or put in funds by such bondholders.

The Trustee shall not be answerable for the acts or omissions of any agent employed by it in good faith, nor for anything other than gross negligence or wilful default in the discharge of the duties of Trustee.

The word "Trustee" as used in this mortgage, shall be construed to mean the Trustee for the time being.

Twenty-first. The Water Company and the Trustee shall, upon reasonable request, execute such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purpose of this mortgage and to place under the lien of the

mortgage all property and franchises provided to be covered hereby which the Water Company shall hereafter acquire, and to transfer to any new Trustee the property, estate, rights and powers held by the Trustee hereunder.

Twenty-second. The Trustee shall, upon payment of the principal and interest of all the bonds secured hereby, according to their terms and to the terms of this mortgage, and payment of the reasonable compensation and lawful charges of the trustee, execute, acknowledge and deliver, on demand, any instrument which the Water Company shall deem necessary or proper to secure the cancellation of this mortgage and the satisfaction thereof on the record.

Twenty-third. The Guaranty Trust Company of New York accepts the trust created by this mortgage, upon the terms, conditions and agreements hereinbefore set forth.

241 In Witness Whereof, each of the parties hereto has caused its corporate seal to be hereto affixed, and attested by its Secretary or Treasurer, and this instrument to be signed by its President or Vice-President, as of the day and year first herein written; this instrument being executed in duplicate.

[The Omaha Water Company, Incorporated 1896, State of
Maine.]

THE OMAHA WATER COMPANY,
By FREDERICK STRAUSS, *Vice-President*.

In the presence of:

W. B. CARDOZO, *Witness*.

Attest:

EBEN STEVENS, *Secretary*.

GUARANTY TRUST COMPANY OF
NEW YORK,

By W. G. OAKMAN, *President*.

Attest:

H. A. MURRAY, *Treasurer*.

[Guaranty Trust Company of New York, Chartered 1864.]

STATE OF NEW YORK,

City and County of New York, ss:

On this 24th day of July 1896, before me, a notary public of the State of New York in and for the county of New York, personally appeared Frederick Strauss, Vice-President of the Omaha Water Company, one of the corporations described in and which has executed the foregoing instrument, to me personally known to be the identical person whose name is affixed to said instrument, and acknowledged said instrument to be the voluntary act and deed of said corporation, and being by me duly sworn, did depose and say; that he resides in the city of New York, and is the Vice-President of said The Omaha Water Company and knows the corporate seal of said

corporation and that the seal affixed to the foregoing instrument is such corporate seal and was thereto affixed by authority of the Board of Directors of said corporation, and as the voluntary act and deed of said corporation, for the purposes expressed in said instrument, and that he also signed his name to said instrument as Vice-president of said corporation by the like authority and further as the voluntary act and deed of said corporation for said purposes.

242 In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of New York, in the County and State of New York, on the day last herein written.

[Seal William B. Cardozo, Notary Public, New York.]

W. B. CARDOZO,
Notary Public, No. 18, New York County.

STATE OF NEW YORK,
City and County of New York, ss:

On this 24th day of July 1896, before me, a notary public of the State of New York in and for the county of New York, personally appeared Walter G. Oakman, the President of the Guaranty Trust Company of New York, one of the corporations described in and which has executed the foregoing instrument, to me personally known to be the identical person whose name is affixed to said instrument, and acknowledged said instrument to be the voluntary act and deed of said corporation, and being by me duly sworn, did depose and say; that he resides in the city of New York, and is the President of said Guaranty Trust Company of New York and knows the corporate seal of said corporation, and that the seal affixed to the foregoing instrument is such corporate seal and was thereto affixed by authority of the Board of Directors of said corporation, and as the voluntary act and deed of said corporation, for the purposes expressed in said instrument, and that he also signed his name to said instrument as President of said corporation by the like authority and further as the voluntary act and deed of said corporation for said purposes.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of New York, in the County and State of New York, on the day last herein written.

[Seal William B. Cardozo, Notary Public, New York.]

W. B. CARDOZO,
Notary Public, No. 18, New York County.

Form 1.

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and
243 County the same being a Court of Record Do Hereby Certify that W. B. Cardozo, whose name is subscribed to the Certifi-

cate of the proof or acknowledgement of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgement, a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County, the 25 day of July, 1896.

[New York Seal.]

[SEAL.]

HENRY D. PURROY, *Clerk.*

THE STATE OF NEBRASKA,
Douglas County, ss:

Entered on Numerical Index and filed for record in the Register of Deeds Office of said County, the 28th day of July, 1896, at 3 o'clock P. M., and recorded in book 248, of mtgs. page 110.

PETER E. ELSASSER,

Register of Deeds.

Endorsed: Filed July 24, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 24th day of July, 1907, Certified Copy of a consolidated mortgage of the Omaha Water Company to the Farmers' Loan and Trust Company dated July 23, 1896, offered in evidence was filed in said case, which said Certified copy of Mortgage is in words and figures following, to-wit:

The Omaha Water Company
to
The Farmers' Loan and Trust Company.

Copy.

Consolidated Mortgage.

Dated July 23d, 1896.

The Omaha Water Company.

Consolidated Mortgage.

This indenture, made the 23d day of July, in the year one thousand eight hundred and ninety-six, between the Omaha Water Company a corporation of the State of Maine, hereinafter called the Water Company, of the first part, and The Farmers' Loan and Trust Company, a corporation of the State of New York, hereinafter called the Trustee, of the second part.

Witnesseth:

Whereas, The Water Company is a corporation duly formed under the laws of the State of Maine, and is authorized to acquire, enlarge, maintain and operate Water Works in Douglas County and elsewhere in the State of Nebraska, and to supply the City of Omaha, the City of South Omaha and the City of Florence and other cities and places in the State of Nebraska, and the citizens and inhabitants thereof, with water for domestic, mechanical, public and fire purposes, with power to acquire, hold, lease and convey real estate suitable for the business of the corporation, and with the right to issue bonds and secure the same by mortgage of the franchises, rights, contracts and properties of the corporation for its corporate purposes; and

Whereas, the Water Company has acquired the water works and other property hereinafter described, formerly owned or held by the American Water Works Company of Illinois and the American Water Works Company of New Jersey, and sold under foreclosure of the mortgage of the former company, dated July 1, 1887, and its supplemental mortgage, dated January 16, 1889, pursuant to decrees of the Circuit Court of the United States for the district of Nebraska and the United States Circuit Court of Appeals for the Eighth Circuit; and

Whereas, The Water Company is indebted for the property so acquired, and it is necessary for the Water Company for the purpose of paying its indebtedness, and for the transaction of its business and the exercise of its corporate rights, privileges and franchises to borrow money, and to issue and dispose of its bonds for the amount so borrowed, and to mortgage its franchises, rights, contracts and properties to secure the payment of such bonds; and

Whereas, The Water Company has been authorized by vote of its stockholders and its Board of Directors to borrow the money necessary for the purposes aforesaid and to issue for a part of the money so borrowed, its bonds to the amount of six million dollars, payable in gold coin of the United States of America of the present standard, or in its equivalent, on the first day of July, 1946, and bearing interest from the first day of July 1896, at the rate of four per cent.

245 per annum, for two and one-half years, and at the rate of four and one-half per cent per annum for two and one-half years from January 1, 1899 and at the rate of five per cent per annum from July 1, 1901, payable in like coin on the first day of January and the first day of July in each year, until the principal sum is paid, and to be redeemable at any time at one hundred and five per cent. and accrued interest; each bond to be for one thousand dollars and to be sealed with the corporate seal of the Water Company, attested by its Secretary, and to be signed for the Water Company by its President, and to have interest coupons annexed, with the engraved fac-simile of the signature of its Treasurer thereon, and to be duly certified by the Trustee of this mortgage; and

Whereas, the stockholders of the Water Company and its said Board of Directors have, for the purpose of securing the payment equally of all of said bonds and the interest thereon, authorized and directed the execution of this mortgage to the Trustee, under date of

July 23d, 1896, mortgaging the franchises of the Water Company and its water works and other property hereinafter described; and

Whereas, the said stockholders and Board of Directors have authorized and directed that said bonds and coupons and the certificates and the [Trustee] be substantially in form as follows:

(Form of Consolidated Mortgage Bond.)

UNITED STATES OF AMERICA,
STATE OF MAINE.

The Omaha Water Company.

Consolidated Mortgage Gold Bond.

No. —.

\$1,000.

For value received, The Omaha Water Company promises to pay to the bearer or registered holder of this bond One Thousand dollars, upon the first day of July, 1946, and to pay interest on said sum from the first day of July, 1896, at the rate of four per cent per annum for the first two and a half years, and at the rate of four and a half per cent per annum for the next two and a half years, and at the rate of five per cent per annum thereafter, on the first of January and the first day of July in each year, upon presentation and surrender of the proper coupon hereto annexed, and until said principal sum is paid; both principal and interest being payable in gold coin of the United States of America of the present standard, or in its equivalent, at the office of the Farmers' Loan and Trust Company or other agency of said Water Company in the City of New York, without deduction from principal or interest for any tax which said Water Company may be required by any present or future federal or state law to pay thereon or to retain therefrom.

This bond is one of an issue of bonds of like amount, tenor and date, limited to the aggregate amount of six million dollars, numbered from one to six thousand, both included, all of which are equally secured by, and are subject to the terms of a Consolidated Mortgage or deed of trust, dated July 23d, 1896, duly executed and delivered by The Omaha Water Company to The Farmers' Loan and Trust Company, as Trustee, mortgaging the franchises of said Water Company and its water works in Douglas County, Nebraska, and its other property described in said mortgage.

Under certain conditions the principal of all the bonds issued under said mortgage may become due and payable before maturity, as provided in the mortgage.

This bond may be registered on the bond transfer books of said Water Company at its office or agency in the City of New York, and after registration certified hereon by the bond transfer agent of said Water Company no transfer of this bond, except on said books, shall be valid until after registered transfer to bearer, when this bond shall again become transferable by delivery and remain subject to suc-

cessive registrations and transfers. The coupons annexed to this bond shall always be transferable by delivery.

This bond is redeemable at any time by said Water Company at one hundred and five per cent and accrued interest, as provided in said mortgage.

This bond shall be valid only when authenticated by the certificate hereon of the Trustee of the mortgage herein described, to the effect that it is one of the issue of bonds mentioned in said mortgage.

In Witness Whereof, the said Water Company has caused its corporate seal to be hereto affixed, and attested by its secretary, and this bond to be signed by its president, and has hereto annexed coupons with the fac-simile signature of its treasurer thereon, as of the 23d day of July, 1896.

THE OMAHA WATER COMPANY,
By ———, *President.*

Attest:
———, *Secretary.*

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(*Form of Coupon.*)

The Omaha Water Company will pay to bearer on the first day of ———, at its agency in the City of New York, — Dollars, being six months' interest then due on its Consolidated Mortgage Gold Bonds No. —.

———, *Treasurer.*

(*Form of Trustee's Certificate.*)

The Farmers' Loan and Trust Company, as Trustee, hereby certifies that this bond is one of the issue of bonds mentioned in the mortgage therein described.

THE FARMERS' LOAN AND TRUST COMPANY,
By ———, *Vice-President.*

Now Therefore, in consideration of the premises and of the agreements hereinafter made, and of one dollar received by the Water Company from the Trustee, and in order to secure the payment of the principal and interest of all the bonds aforesaid at any time outstanding, the Water Company hereby grants, conveys, assigns and transfers to the Trustee, its successors and assigns the franchises of the Water Company and its water works and other property described as follows:

All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge street to the east line of Fifth street in said city; thence southerly along the east line of said Fifth street to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly along the east line of said right of way, to the south line

of State street in said city; thence easterly along the south line of said State street, to the east line of said railroad right of way, south of State street, thence southerly along said right of way to the north line of Washington street in said city; thence easterly along the north line of said Washington street to the east line of Mill street in said city; thence northerly along the east line of said Mill street to the northwest corner of Block two hundred and fifty-eight (258) in said city; thence easterly along the north line of said Block two hundred and fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings, to the place of beginning;

Also that other piece or parcel of land in said city of Florence known and described as Blocks number two (2), one hundred and twenty-six (126) and two hundred and sixty (260) as laid down on the plat of said city, recorded in the Register's office of said Douglas county;

Also those parts of Adams, Farnam and Sheffield streets heretofore vacated in said City of Florence, lying between the west line of Water street and the east line of Mill street in said city.

Also that other piece or parcel of land known and described as the north fifty (50) feet of lot Eighteen (18) and the west ten (10) feet of the north fifty (50) feet of lot seventeen (17) both in Block two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said Douglas County;

Also that other parcel of land known as Lot B in Reservoir Addition to the said city of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County;

Also those other parcels of land known as Lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) in Block Q, and Lots one (1), two (2), five (5) and six (6), in Block Three Hundred and Twenty-eight (328), in the city of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office;

Also that certain other parcel of land in said city of Omaha, described as follows:

Beginning at a point on the south line of Burt street, at the northeast corner of Block Three Hundred and Sixty (360) in said city; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt street, produced east from its present termination; thence west to the place of beginning;

Also those two other pieces or parcels of land described as follows: Lots seven (7) and ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the city of Omaha, according to the plat of said Addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of

the northeast one-quarter of section seven (7) in township fifteen (15) north of Range Thirteen (13) east of the Sixth Principal Meridian:

Also all other lands and rights and interests in lands which the Water Company now has in said County of Douglas and State of Nebraska and all of which it shall acquire;

Also all the property, right, title and interest, claims and demands which the Water Company has or shall acquire under or by virtue of a certain ordinance of the City of Omaha in the State of Nebraska, known as Ordinance 423, entitled, "An Ordinance to Authorize and Procure the Construction and Maintenance of Water Works in the City of Omaha, State of Nebraska, passed by the City Council of said City, and approved by the Mayor thereof, on the 11th day of June, 1880" and all other ordinances of said City amendatory thereof or supplemental thereto;

Also all the property, right, title and interest which the Water Company has and all which it shall acquire under or by virtue of a certain contract bearing date the 20th day of July, 1880, between the City of Omaha, party of the first part and Sidney E. Locke, party of the second part, the rights of said Locke under which contract passed to the American Water Works Company of Illinois and were mortgaged by said Company to the Farmers' Loan & Trust Company, Trustee, by a mortgage dated July 1, 1887, and a supplemental mortgage dated January 16, 1889, and were sold on the foreclosure of said mortgages, and were acquired by the Water Company from the purchasers at the foreclosure sale;

Also all the property, right, title and interest which the Water Company has, and all which it shall acquire under or by virtue of an ordinance of the Mayor and Council of the City of South Omaha, known as Ordinance No. 29, entitled "An Ordinance Granting an Exclusive Right to Lay a System of Water Works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the Sale of Water for Domestic and Fire purposes, to the American Water Works Company of Chicago, Illinois, for the Term of Seventeen Years," passed by the Mayor and Council of said City of South Omaha, and approved by the Mayor of said city on the 17th day of October, 1887, and mortgaged by said Company as aforesaid, and sold on the foreclosure of said mortgages, and acquired by the Water Company from the purchasers at the foreclosure sale;

250 Also all the property, right, title and interest which the Water Company has, and all which it shall acquire, under or by virtue of an ordinance of the City of Florence, entitled "An Ordinance to procure a supply of Water for the City of Florence and its inhabitants for Fire and Domestic purposes, and to contract with the American Water Works Company therefor," passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and under and by virtue of the contract in pursuance of said ordinance between said City and said Company, and mortgaged by said Company as aforesaid, and

old on foreclosure as aforesaid, and acquired by the Water Company from the purchasers at the foreclosure sale;

Also all and singular the pipes, mains valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities, or elsewhere in the County of Douglas, in the State of Nebraska;

Also all the right, title and interest which has at any time heretofore vested in or been held or enjoyed by the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them under or by virtue of the several ordinances and contracts aforesaid, or otherwise acquired, held or enjoyed by either of said companies;

Also all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets of the Water Company, and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature, however arising, out of the Water Company against the City of Omaha, the City of South Omaha and the City of Florence, or any of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing or may at any time hereafter accrue;

Also all the right, title and interest which the Water Company shall at any time acquire under or by virtue of any new ordinance of the City of Omaha or the City of South Omaha, or the City of Florence, or any other city or any village of the state of Nebraska, or by virtue of any contract between the Water Company and any of said cities or any other city or any village of said state;

Also all other property of whatever description which the Water Company now owns and all which it shall in any way acquire;

251 Also all franchises and all powers, rights, privileges, immunities and exemptions which the Water Company now has and all which it shall acquire;

Also all future tolls, revenues, incomes and profits from any of the property and franchises at any time covered by this mortgage;

To have and to hold all the said property and franchises whether now owned or hereafter acquired by the Water Company unto the Trustee and its successors and assigns in said trust forever; subject however, to the lien of a certain mortgage, dated August 2, 1880, made by the City Water Works Company of Omaha to The Farmers' Loan and Trust Company as Trustee, under which bonds are outstanding to the amount of four hundred thousand dollars, bearing six per cent. interest and due on August 2d, 1905, and redeemable at par and interest on August 2d, 1900; also subject to a prior lien mortgage, dated July 23d, 1896, made by the Water Company to the Guaranty Trust Company of New York, as Trustee, to secure bonds to the amount of \$1,500,000, bearing five per cent interest and due July 1st, 1916; the property and franchises hereby conveyed to be held in trust, nevertheless, under the provisions hereinafter set forth, for the benefit of all holders of bonds duly issued under this

mortgage and to secure the payment of the principal and interest of all such bonds, according to their terms and the terms of this mortgage, without any preference as to any of said bonds by reason of priority in the time of issue or negotiation or otherwise; provided however, that, if the Water Company shall pay the principal and interest of all of said bonds, according to the terms of the bonds and of this mortgage and the reasonable compensation and lawful charges of the Trustee, all the estate and interest of the Trustee in said water works and other property and in said franchises, and all lien thereon by reason of this mortgage, shall cease.

It is agreed, between the parties hereto and by the Water Company with all who shall hold any of the bonds issued under this mortgage, that the further provisions under which said bonds are to be issued by the Water Company, and said mortgaged property and franchises are to be held by the Trustee, are as follows:

First. The Water Company shall forthwith execute all of the bonds provided for by this mortgage and deliver them to the Trustee. None of said bonds shall be valid until authenticated by the certificate thereon of the Trustee that said bond is one of the issue of bonds authorized by this mortgage.

252 The Trustee shall forthwith so certify on three thousand and six hundred of said bonds, numbered, *numbered* from one to thirty six hundred, both included, and shall deliver said bonds as directed by resolution of the Board of Directors of the Water Company, stating that said bonds are required to be used towards payment for the property acquired as set forth in this mortgage; which bonds the Water Company agrees shall be so used.

The Trustee shall reserve seventeen hundred and fifty of the remaining bonds, numbered from thirty-six hundred and one to fifty-three hundred and fifty, both included; and whenever the Board of Directors of the Water Company shall, by resolution, certify that a specified amount of bonds secured by this mortgage has been sold by the Water Company for the redemption or purchase of prior lien bonds of the Water Company hereinbefore described or for the enlargement or improvement of the mortgaged property, the Trustee shall certify said reserved bonds to the amount so sold, and shall deliver said bonds as directed by such resolution, upon receiving a certificate of the Trustee of the mortgage securing said prior lien bonds that for every seven thousand dollars in amount of said reserved bonds so sold, six thousand dollars in amount of said prior lien bonds have been cancelled, or that six thousand three hundred dollars in money have been received by such Trustee for the redemption thereof.

The Trustee shall reserve six hundred and fifty of the remaining bonds, numbered from fifty-three hundred and fifty-one to six thousand, both included; and shall from time to time certify and deliver said bonds as directed by resolution of the Board of Directors of the Water Company, stating that a specified amount of such bonds is required for the enlargement or improvement of the mortgaged property, and that all the prior lien bonds of the Water Company reserved for this purpose have been sold or cancelled.

Every such resolution directing the delivery of any reserved bonds shall be accompanied by the certificate of the General Manager and Treasurer of the Water Company that its earnings available for the purpose are sufficient to pay the interest on all outstanding bonds secured by mortgages on its property and also on the amount of bonds specified in such resolution.

Compliance with the foregoing directions shall be a full protection to the Trustee in certifying and delivering bonds secured hereby, and the Trustee shall be under no obligation to verify any facts stated or certified as aforesaid.

253 If any bond issued hereunder shall be mutilated, lost or destroyed, the Water Company may, upon terms and conditions prescribed by its Board of Directors, issue in lieu thereof a new bond of like tenor, amount and date and bearing the same serial number, which bond, when so issued, shall be duly certified by the Trustee, upon due proof of such mutilation, loss or destruction, and upon receiving indemnity satisfactory to the Trustee.

Second. The Water Company shall pay the principal of all the bonds duly issued under this mortgage when the principal shall become due by the terms of the bonds or by redemption or declaration, as hereinafter provided, upon the surrender of the bonds; and it shall pay the interest thereon, according to the terms of the bonds, upon the presentation and surrender of the proper coupons for such interest and until the principal of the bonds is paid, without deduction from principal or interest for any tax which the Water Company may be required by any present or future federal or state law to pay thereon or to retain therefrom.

As the coupons annexed to said bonds are paid, they shall be cancelled, and no purchase of any coupons, nor any advance or loan thereon nor redemption thereof, by or on behalf of the Water Company, after the same shall have been detached from the bonds to which they belong, shall keep such coupons alive or preserve their lien upon the mortgaged property or franchises.

Third. The Water Company shall keep an agency in the City of New York, while any bonds secured by this mortgage are outstanding, for the payment of the interest and principal of said bonds; and it shall also maintain an agency in said city where it shall keep transfer books on which the bonds shall, upon request of the holder be registered without expense to the holder. Every registration shall be certified on the bond by the bond transfer agent of the Water Company, after which no transfer of the bond, except on said books, shall be valid, until after registered transfer to bearer, when the bonds shall again become transferable by delivery, but remain subject to successive registrations and transfers. The coupons annexed to any of such bonds, whether the bond be registered or not, shall always be transferable by delivery.

The trustee shall have access to all said books at all reasonable times, and upon request in writing shall have a list of the registration of bonds shown thereon at any date specified.

For the purpose of administering the trust created by this mort-

gage, the person in whose name any bond is so registered shall be taken to be the owner of the bond.

254 Fourth. The Water Company may at any time redeem any of the bonds secured by this mortgage at one hundred and five per cent and accrued interest. In order to make redemption, the Water Company shall cause the serial numbers of so many bonds as it shall at any one time propose to redeem to be drawn by a notary public of the City of New York from the serial numbers of all the bonds hereby secured then outstanding. The Water Company shall thereupon publish, at least once a week for four successive weeks, in a newspaper of general circulation published in the City of New York and in a newspaper of general circulation published in the City of Omaha, a notice that such bonds will be redeemed, at the agency of the Water Company in the City of New York, at one hundred and five per cent with accrued interest, on the next interest day. Further interest upon such bonds shall then cease, if the Water Company shall have then provided at such agency the money for the due redemption thereof.

Fifth. The Water Company, so long as there is no default in the payment of any interest or of the principal of any of the bonds secured by this mortgage, or by said underlying mortgages, or in any of the agreements of the Water Company herein set forth, shall have the possession, operation, management and use of the property and franchises covered by this mortgage, and shall receive the revenues, income and profits thereof, as if this mortgage had not been made.

Sixth. The Water Company, so long as there is no default in the payment of any interest or of the principal of any of the bonds secured by this mortgage or by said underlying mortgages, or in any of the agreements of the Water Company herein set forth, shall have the right to sell or otherwise dispose of, free from any lien created by this mortgage, any machinery, materials or other movable property which shall become old, worn out or unfit for use or undesirable, or which the Water Company shall not need for the proper conduct of its business; and shall have the right, with the written consent of the Trustee to sell or otherwise dispose of, with like effect, any real estate or any other personal property covered by this mortgage not needed for the proper conduct of the Water Company's business; the resolution of the Board of Directors of the Water Company, accompanied by the affidavits of its President and General Manager or Chief Engineer, to be sufficient evidence to protect the Trustee in giving such consent. The Trustee shall, upon the written request of the Water Company, join in the conveyance and transfer of any real estate or other property sold or otherwise disposed of as hereinbefore provided.

255 All proceeds of real estate or other property sold or disposed of as aforesaid shall forthwith be applied by the Water Company to the replacement of the property so sold, or otherwise for the benefit of the mortgaged property. Any property acquired with the proceeds of any sale of property covered by this mortgage, or substituted therefor, shall be subject to the lien and provisions of this mortgage, and upon the written request of the Trustee, shall

be conveyed by the Water Company to the Trustee, to be held upon the trust hereby created.

Seventh. The Water Company shall, subject to the provisions aforesaid, properly maintain and operate all the water works owned or controlled by it, and all other property at any time covered by this mortgage, and shall preserve the franchises rights and privileges and relating thereto, repairing renewing and replacing the mortgaged property as may be necessary.

The Water Company shall keep all buildings, furniture, machinery, tools and implements and other combustible property at any time covered by this mortgage, properly insured against loss or damage by fire. The moneys collected on any policy of insurance shall be promptly applied by the Water Company to the replacement or reconstruction of the destroyed or damaged property, or otherwise for the benefit of the mortgaged property.

Eighth. The Water Company shall pay or cause to be paid when the same shall become due and payable, all taxes, assessments and governmental and other like charges lawfully imposed on any of the property or franchises covered by this mortgage, and shall not suffer any lien superior to the lien of this mortgage to attach to any part of said property or franchises and shall not commit nor suffer any waste thereof. The Water Company shall pay all taxes which it may be required by any present or future federal or state law to pay on or retain from the principal or interest of any of the bonds secured by this mortgage.

Should the Water Company fail to pay any such tax, assessment or governmental or other charge, or suffer any such lien to attach to any such property or franchises, the Trustee may pay and discharge the same, but shall be under no obligation to do so.

Ninth. The Water Company shall repay, on demand, all moneys expended by the Trustee in the payment or discharge of any tax, assessment or other governmental or like charge or of any lien on any of said property or franchises, and shall pay the Trustee a reasonable compensation for administering the trust created by
256 this mortgage, and all charges and expenses, including expenses of attorneys and counsel, properly incurred by the Trustee in connection therewith. Should the Water Company fail to repay such moneys, or to pay such compensation, charges or expenses, the same shall be paid to the Trustee out of the proceeds of any sale of the mortgaged property hereinafter provided for.

Tenth. If default shall be made in the payment of any interest on any of the bonds secured by this mortgage, or by either of said underlying mortgages, or in any of the agreements on the part of the Water Company hereunder, and such default shall continue for six months after written demand of payment or performance, or if a receiver of the property of the Water Company hereby mortgaged shall be appointed in any proceeding, the principal of all the said bonds then outstanding, with all interest accrued and unpaid thereon, shall become due and payable at the election and upon the declaration of the Trustee, or upon the declaration of the holders of one third in amount of the bonds secured by this mortgage and then

outstanding, made as hereinafter provided and filed with the Trustee; but the holders of a majority in amount of the bonds hereby secured may, at any time thereafter, until a sale of the property and franchises secured by this mortgage, reverse in like manner any such declaration previously made by the Trustee or by bondholders, or, such default or receivership continuing or again happening, such principal may again in like manner as aforesaid be declared to be due; and said principal shall cease to be due or become due accordingly; provided, however, that in case of any such declaration made by the Trustee, the payment of all interest, taxes, or other charges due, and the performance of any agreements as to which default shall have been made, shall operate to reverse and avoid such declaration made by the Trustee. But upon any sale of the property and franchises covered by this mortgage, the principal of all the bonds secured hereby and then outstanding shall become due, if not already due by the terms of the bonds or by declaration as herein provided.

Eleventh. If default shall be made in the payment of any interest or of the principal of any of the bonds secured by this mortgage, or in any of the agreements of the Water Company herein set forth, and shall continue for six months after written demand of payment or performance, the Trustee shall, upon request made as hereinafter provided and filed with the Trustee by the holders of one-fifth in amount of the bonds hereby secured and then outstanding, 257 and upon reasonable indemnity, such default continuing, enter upon and take possession of all the water works and other property of the Water Company covered by this mortgage, and operate said works and property and conduct the business of the Water Company pertaining thereto and receive all the revenues, income and profits therefrom, and from the receipts shall pay all expenses of operation, and make such repairs, replacements, alterations, additions, and improvements to the mortgaged property as the Trustee shall deem needful, and pay all taxes due upon any of the mortgaged property and all interest due on any bonds secured by said underlying mortgages, and shall, after deducting such expenses and retaining a reasonable compensation for its services, apply the next income from said business to the payment of any coupons previously due or becoming due during such possession on bonds secured by this mortgage, ratably, in the order in which such coupons shall have become due, until the principal of said bonds shall become or be declared due; and shall thereafter apply any remainder of said net income to the payment of the principal of said bonds, with all interest accrued and unpaid thereon, ratably, to the owners of said principal and interest, without discriminating or preference.

If, after such entry, all interest due on the bonds secured hereby and then outstanding shall in such manner be fully paid out of the income of said property, and the principal of said bonds shall not be due by the terms of the bonds or by declaration as herein provided, and there shall be no other default on the part of the Water Company under this mortgage, the Trustee shall restore said property to the

Water Company, but without prejudice to the right of entry for any subsequent default.

Twelfth. In case of like default and upon like request and indemnity, the Trustee shall, either with or without entry, such default continuing, cause all of the property and franchises then covered by this mortgage to be sold as one property at public auction, at the City of Omaha or at such other place as the Trustee may designate, after advertising notice of sale at least once a week for four successive weeks in a newspaper of general circulation published in the City of Omaha and in a newspaper of general circulation published in the City of New York.

The Trustee may adjourn such sale from time to time in its discretion, without further advertising, and after the sale, shall
258 execute, acknowledge and deliver a good and sufficient deed of conveyance of said property, which shall be a bar against the Water Company and all persons claiming under it, with respect to any of the property so sold.

The Trustee shall apply so much of the net proceeds of sale as may be necessary to the payment of the principal and interest then unpaid on the bonds secured hereby and then outstanding, ratably to the holders thereof, without discrimination or preference, and shall pay over any surplus to the Water Company or to whoever shall be entitled to receive the same.

Thirteenth. The Water Company may, by vote of its Board of Directors, waive the provisions hereinbefore contained in regard to continuation of default for six months before the principal of the bonds can be declared due or entry or sale made hereunder; and the Trustee and the holders of bonds secured by this mortgage may, immediately upon the waiver, take any action which, under the terms of this mortgage, they would have the right to take at the expiration of such period.

Fourteenth. The Trustee shall not, however, at any time without request made as hereinafter provided and filed with the Trustee by the holders of one-fifth in amount of bonds hereby secured and then outstanding, enter upon or take possession of or sell, under said powers of entry and sale, any of the property covered by this mortgage.

Fifteenth. In case of any default by the Water Company, whether in the payment of the principal or interest of any of the bonds secured by this mortgage, or by either of said underlying mortgages, or in the performance of any agreement of the Water Company herein set forth, the Trustee may, at any time after such default, the default continuing, begin foreclosure or other appropriate proceedings in any proper Court, by way of remedy, as the Trustee, being advised by counsel, shall deem most expedient for the interests of the holders of said bonds hereby secured; and the Trustee shall, upon reasonable indemnity at any time after such default, the default continuing, proceed to enforce a remedy by foreclosure or other [appropriation] proceedings in any proper Court, upon request made as hereinafter provided and filed with the Trustee by the holders of one-fifth in amount of the bonds hereby secured and then outstanding.

Sixteenth. The Water Company shall not, while any bonds secured by this mortgage are outstanding, apply for the appointment of a Receiver of any property covered hereby. No holder of bonds secured hereby shall have a right to begin foreclosure or other
259 proceedings, by way of remedy hereunder, until the Trustee shall refuse or neglect to begin the same within a reasonable time after sufficient request made as herein provided and filed with the Trustee, with offer of reasonable indemnity.

Seventeenth. The Water Company hereby irrevocably waives all benefit of any present or future valuation, stay, extension or redemption laws, and hereby irrevocably waives all right to have the mortgage property and franchises marshalled upon any sale thereof, and consents that the same be sold as one property.

Eighteenth. In case of a foreclosure of any judicial or other sale of the property and franchises held in trust under this mortgage, the purchaser, after paying in money enough to cover the costs and expenses of the sale, and of the proceedings relative thereto, and any unpaid charges, expenses or compensation of the trustee, and such other charges as the trustee or the Court having jurisdiction of the proceedings may require to be paid in money, may, in completing payments of the purchase price, apply any bonds and coupons secured hereby, then matured and unpaid, counting the same at such sums as would be payable as a dividend thereon out of the net proceeds of such sale upon a due accounting and apportionment. But if the amount so payable thereon shall be less than the amount due on said bonds and coupons, the receipt of such amount endorsed thereon shall be sufficient evidence of the application of such amount on such purchase price.

Nineteenth. Any consent, declaration, request or appointment herein provided to be made by bondholders shall be by instrument or similar instruments in writing, signed by the bondholders or by their attorneys duly authorized for the purpose, and proved in each case by the certificate of an officer authorized to take acknowledgements that the persons signing the same acknowledged the execution thereof and acknowledged before such officer the ownership of the bonds by the person claiming to be the owner thereof. Every power under which an attorney shall sign any such instrument must be proved by a like certificate, and be filed with the instrument so signed. The Trustee may however, require all persons claiming to be owners to produce their bonds, or give other evidence of ownership satisfactory to the trustee.

The trustee may at any time call a meeting of the holders of bonds secured hereby for action under the provisions of this mortgage, and shall call such meeting upon the request of holders of not less than one-fifth in amount of said bonds then outstanding; and such holders may themselves call such meeting upon the failure of the
260 Trustee to comply promptly with such request. Every such meeting shall be held in the city of New York, unless otherwise directed by such bond-holders.

Twentieth. The Trustee may resign its trust under this mortgage

by notice in writing to the Water Company, given at least thirty days before the resignation is to take effect.

In case of a vacancy in the office of Trustee, a new Trustee may be appointed by the holders of a majority in amount of the bonds secured hereby and then outstanding, by duplicate instruments of appointment made as hereinbefore provided and filed with the Water Company and the new Trustee and recorded in the offices where this mortgage is recorded. The Water Company may, by instrument of appointment authorized by its Board of Directors, and executed under its corporate seal and duly acknowledged, and recorded in the offices where this mortgage is recorded, appoint a Trustee to fill the vacancy until an appointment shall be so made by bondholders.

If a vacancy in the office of Trustee shall remain unfilled for thirty days, any holder of a bond secured hereby may on not less than ten days' notice to the Water Company, apply to any Court of competent jurisdiction for the appointment of a new Trustee.

Every new Trustee, however appointed, shall be a duly incorporated trust company.

Every new Trustee shall, immediately upon appointment and by virtue thereof, be vested with all the property and estate and have all the rights, powers and discretion, then belonging to the Trustee under this mortgage.

The Trustee shall be under no obligation to record this mortgage other than as a mortgage of real estate, or to give notice of this mortgage or of any assignment effected thereby, to the promisor, obligor or covenantor of any contract or chose in action covered or assigned by said mortgage, or to insure any of the mortgaged property, or to see that the covenants or agreements of the Water Company are performed, until requested thereto as herein provided, by holders of bonds secured hereby and reasonably indemnified or put in funds by such bondholders.

The Trustee shall not be answerable for the acts or omissions of any agent employed by it in good faith, nor for anything other than gross negligence or wilful default in the discharge of the duties of Trustee.

The word "Trustee" as used in this mortgage, shall be construed to mean the Trustee for the time being.

261 Twenty-first. The Water Company and the Trustee shall, upon reasonable request, execute such further instruments, and do such further acts as may be necessary or proper to carry out more effectually the purposes of this mortgage and to place under the lien of the mortgage all property and franchises provided to be covered hereby which the Water Company shall hereafter acquire, and to transfer to any new Trustee the property, estate, rights and powers held by the Trustee hereunder.

Twenty-second. The Trustee shall, upon payment of the principal and interest of all the bonds secured hereby, according to their terms and to the terms of this mortgage, and payment of the reasonable compensation and lawful charges of the Trustee, execute, acknowledge and deliver, on demand, any instrument which the

Water Company shall deem necessary or proper to secure the cancellation of this mortgage and the satisfaction thereof on the record.

Twenty-third. The Farmers' Loan and Trust Company accepts the trust created by this mortgage, upon the terms, conditions and agreements hereinbefore set forth.

In Witness whereof, each of the parties hereto has caused its corporate seal to be hereto affixed, and attested by its Secretary, and this instrument to be signed by its President or Vice-President, as of the day and year first herein written; this instrument being executed in duplicate.

[The Omaha Water Company, Incorporated 1896, State of Maine.]

THE OMAHA WATER COMPANY,
By FREDERICK STRAUSS, *Vice-President*.

In the presence of:

W. B. CORDOZO, *Witness*.

Attest:

EBEN STEVENS, *Secretary*.
THE FARMERS' LOAN AND TRUST
COMPANY.
By R. G. ROLSTON, *President*.

Attest:

[Farmers' Loan and Trust Company, New York.]

SAM SLOAN, JR.,
Ass't Secretary.

STATE OF NEW YORK,

City and County of New York, ss:

On this 24th day of July, 1896, before me, a notary public of the State of New York, in and for the County of New York,
262 personally appeared Frederick Strauss, Vice-President of The Omaha Water Company, one of the corporations described in and which has executed the foregoing instrument, to me personally known to be the identical person whose name is affixed to the above instrument, and acknowledged said instrument to be the voluntary act and deed of said corporation, and being by me duly sworn, did depose and say: That he resides in the City of New York, and is the Vice-President of said The Omaha Water Company and knows the corporate seal of said corporation, and that the seal affixed to the foregoing instrument is such corporate seal and was thereto affixed by authority of the Board of Directors of said corporation, and as the voluntary act and deed of said corporation for the purposes expressed in said instrument, and that he also signed his name to said instrument as Vice-President of said corporation by the like authority and further as the voluntary act and deed of said corporation for said purposes.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of New York, in the County and State of New York, on the day last herein written.

[Seal Willard B. Cardozo, Notary Public, New York.]

W. B. CARDOZO,
Notary Public, No. 18, New York County.

STATE OF NEW YORK,
City and County of New York, ss:

On this 24th day of July, 1896, before me a notary public of the state of New York, in and for the County of New York, personally appeared Rosewell G. Rolston, the President of the Farmers' Loan and Trust Company, one of the corporations described in and which has executed the foregoing instrument to me personally — to be the identical person whose name is affixed to said instrument, and acknowledged said instrument to be the voluntary act and deed of said corporation, and being by me duly sworn, did depose and say: That he resides at Babylon, New York, and is the President of said Farmers' Loan and Trust Company, and knows the corporate seal of said corporation, and that the seal affixed to the foregoing instrument is such corporate seal and was thereto affixed by authority of the Board of Directors of said corporation and as the voluntary act and deed of said corporation for the purposes expressed in said instrument, and that he also signed his name to said instrument
263 as President of said corporation by the like authority and further as the voluntary act and deed of said corporation for said purposes.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at the City of New York, in the County and State of New York, on the day last herein written.

[Seal William B. Cardozo, Notary Public, New York.]

W. B. CARDOZO,
Notary Public, No. 18, New York County.

Form 1.

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify that W. B. Cardozo, whose name is subscribed to the Certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgement, a Notary Public, in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 25 day of July, 1896.

[Seal New York.]

HENRY D. PURROY, *Clerk.*

THE STATE OF NEBRASKA,
Douglas County, ss:

Entered on numerical index and filed for record in the Register of Deeds' office of said County the 28th day of July, 1896, at 3:05 o'clock P. M. and recorded in book 248, of mtgs. page 136.

PETER E. ELSASSER,
Register of Deeds.

Endorsed: Filed Jul. 24, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 25th day of July, 1896, Certified Copy of Special Master's Deed, Elmer S. Dundy, Jr., Master in Chancery to The Farmers' Loan & Trust Company, Trustee, was filed in said cause, which said certified copy of Master's deed is in words and figures following, to-wit:

11. Elmer S. Dundy, Jr., M. in C.,
to
The Farmers' Loan and Trust Co., Trustee.

This indenture made the 16th day of July in the year one thousand Eight Hundred and Ninety-six by and between Elmer S. Dundy, Junior, Master in Chancery of the United States Circuit Court for the District of Nebraska, party of the first part and The Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York as Trustee for the holders of bonds and coupons secured by the Mortgages made by the American Water Works Company of Illinois to The Farmers' Loan and Trust Company, dated respectively the first day of July, 1887, and the Sixteenth day of January, 1899, who have requested the said Farmers' Loan and Trust Company to purchase the property, premises and franchises hereinafter described, party of the second part,

Witnesseth:

Whereas, at a Term of the Circuit Court of the United States for the District of Nebraska, held at the City of Omaha on the Twenty-fourth day of June, 1895, it was among other things ordered, adjudged and decreed by said Court in a certain cause then pending in said Court between the Farmers' Loan and Trust Company, Complainant, The American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, and others defendants, that said American Water Works Company of Illinois and said American Water Works Company of New Jersey either or both pay into the Registry of said Court the sum of money therein mentioned

as found due to the Complainant upon the mortgage debt in said decree mentioned with interest from the date of said decree, to the date of payment within two months from the date of said decree and that in default of so doing all and singular the mortgaged property premises and franchises mentioned in the bill of complaint in said cause and hereinafter described should be sold at public auction by and under the direction of one of the Masters of said Court: and said decree having been amended by a decree of the United States Circuit Court of Appeals for the Eighth
265 Circuit—dated March 16th, 1896, in certain respects providing among other things that the sale of said mortgaged property premises and franchises should be made at the Court House in the County of Douglas in the State of Nebraska, that being the County in which the property to be sold was situated and that notice of such sale should be published once a week for four successive weeks in the Omaha Daily World Herald and the Omaha Daily Bee, said Newspapers being printed, published and regularly issued and having a general circulation in said County of Douglas, State of Nebraska, and also in some newspaper printed, published and regularly issued and having a general circulation in the City of New York, and

Whereas, said decree of June 24, 1895, further provided that a majority in amount of the holders of the bonds secured by the mortgages foreclosed in said suit should have the right by written instrument under the hands of such majority to fix a sum at which it should be the duty of the plaintiff to bid for said property premises and franchises on their behalf for their benefit that such majority joining in the said request to said plaintiff should make provision to its satisfaction for the payment in cash of all expenses incurred in the execution of the trusts declared in the said mortgages which were foreclosed in said suit and the proportion of such sum as might be payable to the bondholders not joining in the said request and that if in pursuance of such request the plaintiff should be the purchaser at said sale it should hold the property so purchased upon trust for the equal benefit of the bondholders who should have required it to buy in the property in their behalf as their absolute property; and

Whereas, neither the said American Water Works Company of Illinois nor the said American Water Works Company of New Jersey nor any other person paid into the Registry of said Court the amount required to be paid by the said decree of June 24, 1895, and within the time therein specified or at any other time; and

Whereas, the said plaintiff in accordance with the terms of said decree was requested by the holders of a majority in amount of said bonds to bid for said premises on their behalf and for their benefit; and

Whereas, the execution of said decree having been duly entrusted to the party hereto of the first part one of the Masters in Chancery of the Circuit Court of the United States for the District of Nebraska, the said Master in pursuance of the said decrees of the said Courts did on the Twentieth day of May one thousand eight hundred
266 and ninety-six sell at public auction at the East door of the Douglas County Court House Building in the City of Omaha,

Douglas County, State and District of Nebraska the said mortgaged property, premises and franchises in said decrees mentioned due notice of the time and place of such sale being given agreeably to said decrees at which sale the mortgaged property, premises and franchises hereinafter described were struck off to the plaintiff, as Trustee for the bondholders requesting it to purchase said property for the benefit of said requesting bondholders for the sum of Four Million Nine Thousand five hundred dollars, that being the highest sum bidden for the same; and

Whereas, said Master duly reported said sale to the Circuit Court of the United States for the District of Nebraska and an order was thereafter entered on the Twenty-seventh day of May 1896 confirming said sale and directing said Master to deliver a deed of said mortgaged property, premises and franchises:

Now, This Indenture Witnesseth:

That the said Elmer S. Dundy, Junior, Master as aforesaid party of the first part to these presents in order to carry into effect the sale so made by him as aforesaid in pursuance of the decrees of said Courts and also in consideration of the premises and the said sum of money so bidden as aforesaid, being first duly paid by the said party of the second part in the manner provided in said decrees that is to say partly in cash and partly in bonds and coupons secured by the said mortgages foreclosed in said suit the receipt whereof is hereby acknowledged Hath granted, bargained, sold released, remised, enfeoffed, confirmed and conveyed and by these presents Doth grant, bargain, sell, release, remise, enfeoff, confirm and convey unto the said The Farmers' Loan and Trust Company party of the second part as Trustee as aforesaid all the property premises and franchises mentioned in said decree of June 24, 1895 and therein described as follows, to-wit:

All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; 267 thence southerly along the east line of said right of way, to the south line of State Street, in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way to the North line of Washington street, in said city; thence easterly along the north line of said Washington Street to the east line of Mill Street in said city; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west bank of the Missouri River, thence north-

westwardly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number- Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also that other piece or parcel of land known and described as the north fifty (50) feet of Lot eighteen (18) and the west ten (10) feet of the north fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B, in Reservoir Addition to the said City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said county.

Also those other parcels of land known as Lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q, and lots One (1) Two (2) Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the City of Omaha, according to a plat of said Addition recorded in said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast one-quarter of section Seven (7) in township fifteen (15) north of Range Thirteen (13) east of the Sixth Principal Meridian. And all other land in the County of Douglas and State of Nebraska, and all the right, title and interest therein, whereof the American Water Works Company of Illinois and the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works

Company of New Jersey or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled "An ordinance to authorize and procure [and] construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said city, amendatory and supplementary thereto, and also under a certain contract bearing date the 29th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an Ordinance of the Mayor and Council of the City of South Omaha, known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the city of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha; and approved by the Mayor of said city on the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all the machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the city of Omaha, the city of South Omaha and the city of Florence any or either of them, whether such debts, dues, or demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may here-

after come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

All of above described property situated in Douglas County, State and District of Nebraska.

To have and to hold all and singular the above described property, premises and franchises hereby conveyed or intended so to be unto the said party of the second part its successors legal representatives and assigns forever as Trustees nevertheless for the bondholders requesting said party of the second part to purchase the same.

In witness whereof, the said Elmer S. Dundy, Junior, Master as aforesaid has hereunto set his hand and seal the day and year first above written.

ELMER S. DUNDY, JUNIOR,
*Master in Chancery of the Circuit Court of the
United States for the District of Nebraska.*

Sealed and Delivered in Presence of
R. CARRIER.

STATE OF NEBRASKA,
County of Douglas, ss:

On this 16th day of July, A. D. 1896, before me a Notary Public duly qualified and residing in said County personally came Elmer S. Dundy, Junior, Master to me personally known to be the identical person whose name is affixed to the above instrument as grantor and acknowledged the same to be his voluntary act and deed and his voluntary act and deed as such Master for the purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my seal at the city of Omaha, County of Douglas and State of Nebraska on the date 1st above written.

[Richard Carrier. Commission expires March 20, 1897.
Notarial Seal, Douglas County, Nebraska.]

RICHARD CARRIER,
Notary Public.

Entered in Numerical Index and Recorded July 16th, A. D. 1896,
at 4 o'clock P. M.

PETER E. ELSASSER,
Register of Deeds.

STATE OF NEBRASKA,
County of Douglas, ss:

I, Frank W. Brandle, Register of Deeds of Douglas County, Nebraska, do hereby certify that I have compared the above
271 and foregoing with the original records in said office, and that the same is a full, true and correct copy of the record of a Special Master in Chancery Deed given by Elmer S. Dundy, Junior Master in Chancery to The Farmers' Loan and Trust Company, Trustee as the same appears of record in Book 205 on page 253 of the Deed records in the office of said Register of Deeds.

In testimony whereof I have hereunto set my hand and affixed my official seal this Twenty-fourth day of July, A. D. 1907.

[SEAL.]

FRANK W. BANDLE,
Register of Deeds, Douglas County, Nebraska.

Endorsed: Filed Jul- 25, 1907. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: On the 27th day of July, 1907 the following order was signed and filed in said case, and duly entered of record in Journal No. "6" of said Court, to-wit:

No. 74. Doc. "X."

OMAHA WATER COMPANY, Plaintiff,
vs.
CITY OF OMAHA, Defendant.

Order.

On motion of the complainant, it is ordered that the following original exhibits used as evidence in the above entitled action be sent up to the United States Circuit Court of Appeals as provided by statute, in lieu of copies thereof (Sec. 698, Rev. Statutes).

EXHIBIT 5. Map of pipe system of Omaha and South Omaha.

6. Blue print showing the land of the Omaha Water Company and Burt Street Station.

7. Old map of Florence.

14. Map showing rip rap and soundings and positions of basins.

15. Blue print produced by witness Marshall.

All filed July 25, 1907.

By the Court.

W. H. MUNGER, *Judge.*

Endorsed: Filed Jul- 27, 1907. Geo. H. Thummel, Clerk.

272 Thereupon afterwards, to-wit: On the 30th day of July, 1907, Præcipe for Transcript was filed in said case which said Præcipe is in words and figures following, to-wit:

United States Circuit Court, District of Nebraska.

No. 74. Docket "X."

OMAHA WATER COMPANY, Complainant,

vs.

THE CITY OF OMAHA, Defendant.

Præcipe for Transcript.

To the Clerk of said Court:

Please make Transcript for the Circuit Court of Appeals in the above entitled case, and include therein the following:

1. Bill in Equity.
2. Answer.
3. Replication.
4. Testimony of Theodore C. Woodbury.
5. Stipulation as to offering of evidence.
6. Stipulation extending time of taking testimony.
7. Depositions filed Mch. 2, 1907.
8. Depositions filed Mch. 6, 1907.
9. Order setting cause down for hearing.
10. Affidavit of R. S. Hall.
11. Testimony behalf Complainant, filed May 13, 1907.
12. Testimony behalf defendant, filed May 13, 1907.
13. Order, Cause argued.
14. Order, Argument continued.
15. Order, Argument concluded, Cause submitted.
16. Memorandum Opinion.
17. Decree Dismissing cause, etc.
18. Assignment of Errors.
19. Petition for an Appeal.
20. Order Allowing Appeal.
21. Order in re-original Exhibits.
22. Bond.
23. Citation.
24. Deed from Farmers' Loan & Trust Co. to Omaha Water Co.
25. Certified copy of Mortgage from Omaha Water Co. to Guaranty Trust Co. of New York.
26. Certified copy of consolidated Mortgage of Omaha Water Co. to Farmers' Loan & Trust Co.
27. Certified copy of Special Master's deed, E. S. Dundy, Jr., to Farmers' Loan & Trust Co.
28. Order in re-original exhibits.
29. *Præcipe for Transcript.*
- 273 30. Proceedings in Case No. 10 Doc. "Q," E. Hyde Rust, Recr. vs. Clarence H. Venner, et al. being Bill, Answer and Order vacating Dismissal.
31. Proceedings in Case No. 96 Doc. "Q," Farmers' Loan & Trust Co., vs. American Water Works Co., et al., being Bill, Answer,

Amendment to Answer, Report of J. D. Cook, Engineer, and Appendix thereto; Ordinances Nos. 423, 430, Contract with Sidney E. Locke, Assignment to City Water Works Company; Ordinances Nos. 445, 469, 618, Decree, Order making decree of Circuit Court conform to decree of Circuit Court of Appeals; Master's report of sale; Order of Confirmation; Order directing Receivers to turn over property to purchaser; and Order directing Master to execute deed to purchaser, and Master's Report of Deed.

32. Proceedings in case No. 24 Docket "S," City of Omaha, vs. Farmers' Loan & Trust Co., as follows: Amended and Supplemental Petition; Answer of Omaha Water Company; Stipulation making Omaha Water Co. a defendant to Bill and Cross-bill; Amended and Supplemental Petition filed March 30, 1897; Amendment to Amended Bill.

33. Proceedings in the case No. 209 Docket "W," Water Board of the City of Omaha, et al., vs. Daniel W. Mead et al., as follows: Bill; Restraining Order; Answer; Testimony filed November 6, 1905; Memo. Opinion filed Nov. 29, 1905; Order answered Nov. 29, 1905; Depositions filed Feb. 3, 1906 and exhibits attached; Testimony filed June 16, 1906 and all exhibits attached; Resolution for appointment of new appraisers.

34. Certificate of Clerk.

Dated this 30th day of July, A. D. 1907.

HALL & STOUT,
Attorneys for Complainant.

Endorsed: Filed Nov. 29, 1905. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: There was offered in evidence in the case of the Omaha Water Company vs. The City of Omaha, No. 74 Docket "X," the Bill in Equity, filed April 27, 1893, the Answer of Clarence H. Venner and Delos A. Chappell, filed September 5, 1893, and Order vacating Dismissal, Substituting Omaha Water Co., as Complainants, 20 days given to file Amended Bill, etc., filed February 14, 1900, in the case of E. Hyde Rust Receiver vs. Clarence H. Venner, et al., No. 10 Docket "Q," which said Bill, Answer and Order are in words and figures following, to-wit:

In the Circuit Court of the United States, within and for the District of Nebraska.

E. HYDE RUST, Receiver of The American Water Works Company (of New Jersey), and The American Water Works Company (of New Jersey), Complainants,

v.

CLARENCE H. VENNER, FREDERICK H. MILLS, and DELOS A. CHAPPELL, Defendants.

Bill in Equity.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Nebraska.

E. Hyde Rust, a resident of the City of Jersey City in the State of New Jersey and a citizen of said State of New Jersey, and The American Water Works Company (of New Jersey), a corporation organized and existing under the laws of New Jersey, and a citizen of said State of New Jersey, bring this their bill against Clarence H. Venner, a resident of the City of New York, in the State of New York and a citizen of said State of New York, and Frederick H. Mills, a resident of the City of Boston in the State of Massachusetts and a citizen of said State of Massachusetts, and Delos A. Chappell, a resident of the City of Trinidad in the State of Colorado and a citizen of said State of Colorado. And thereupon your orators complain and say:

1. Your said orator, The American Water Works Company (of New Jersey) is now and since February 1891, ever has been a corporation duly organized and existing under the laws of the State of New Jersey and as such has been the owner of and engaged in the operation of a system of water works in the County of Douglas and State of Nebraska, by which the cities of Omaha, South Omaha and Florence in said county, were supplied with water; that on the 20th day of July, 1892, under and by virtue of the authority in certain proceedings had in the Court of Chancery in the State of New Jersey, under and in pursuance of the laws of the State of New Jersey, and especially by an act of the legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7th, 1875, and the acts supplementary thereto and amendatory thereof, your orator E. Hyde Rust was duly appointed Receiver, for the stockholders and creditors of the complainant, The American Water Works Company (of New Jersey), and on the 22nd day of July, 1892, your said orator gave bond and duly qualified in said Court of Chancery of New Jersey as such Receiver, and ever since has been and is now acting as such, with all the rights, powers and privileges incident thereto.

2. And thereafter on August 22nd, 1892, your said orator exhibited his petition in an action pending in this court on the equity side of the docket, wherein The Denver City Water Works Company and others were complainants, and The American Water Works

Company (of New Jersey), and others were defendants, the same being Docket P, Number 35, in which said petition your said orator made known to this honorable court that your said orator had been appointed Receiver of the said The American Water Works Company of New Jersey, by the said Court of Chancery of New Jersey, and in which said petition your said orator prayed that this court might ratify, confirm and recognize your said orator as the Receiver of said The American Water Works Company (of New Jersey), and give to your said orator the custody, control and possession of all the properties and assets of the said The American Water Works Company (of New Jersey) situated within the District of Nebraska.

3. That thereafter and on the — day of September 1892 your said orator's application came on for hearing, whereupon it was adjudged and considered, and so ordered by this honorable court, that your said orator, upon the execution of a bond in the sum of Fifty Thousand Dollars, be recognized by this court as the Receiver of said The American Water Works Company (of New Jersey) and adjudged to have and hold the possession and custody of all the rights, properties and assets of said company, and thereafter and on the — day of October, 1892, your said orator gave a bond as provided and required in said order, and duly qualified, and was in fact recognized by this court as the receiver of said company, and in pursuance of said orders and directions of this court, your said orator was on the 18th day of October, 1892, placed in possession of the entire system of water works aforesaid in the County of Douglas and State of Nebraska, including the property hereinafter more specifically described, and ever since your said orator has been and still is in the possession and operation of said Omaha plant and all other properties and assets of said The American Water Works Company (of New Jersey) situated in the State of Nebraska. That the matter in dispute in this action exceeds the value of \$2000.00 exclusive of interest and costs.

4. That your said orator The American Water Works Company (of New Jersey) by a deed of general warranty, of date April 24th, 1891, for a valuable consideration, actually paid by your said orator to The American Water Works Company (of Illinois) acquired and purchased from said The American Water Works Company (of Illinois) all of the said Omaha System of water works, including all of its real and personal property of every kind and description, situated in the District of Nebraska, and more especially in the County of Douglas and State of Nebraska, and on the said 24th day of April, 1891, the said The American Water Works Company (of Illinois) conveyed said property, by deed of general warranty, to your said orator, the said The American Water Works Company (of New Jersey) and your said orator The American Water Works Company (of New Jersey) and your orator, the Receiver aforesaid, are now in the possession of all of said property, and said deed was duly recorded in the office of the Register of Deeds of Douglas County, Nebraska, on October 9th, 1891, in Book 157 of Deeds, at page 195.

5. That by virtue of said conveyance, your said orator, The

American Water Works Company (of New Jersey) and by virtue of his appointment as hereinbefore set forth, your said orator, the receiver of said company as aforesaid, acquired and obtained the title to the property as follows, that is to say, the following real estate situated in the Town of Florence, Douglas County, Nebraska, according to the plat of said Town of Florence as lithographed, and recorded, and as on said plat numbered: Block No. Nine (9); Lot Five (5) in Block One (1); Lot Four (4) in Block Thirty-nine (39); Lots Five (5) Six (6) Seven (7) and Eight (8) in Block Thirty-eight (38); Lots Six (6) and Seven (7) in Block Twenty-nine (29); Lot Two (2) in Block Eighteen (18); Lot Six (6) in Block Nineteen (19); Lot Eight (8) in Block Forty-nine (49), and the South Half ($\frac{1}{2}$) of Lot Four (4) in Block Fifty-one (51) of the plat aforesaid, together with all the tenements, hereditaments and appurtenances to the same belonging, and simultaneously with the date of said deed, your orator The American Water Works Company (of New Jersey) took the actual possession and occupation of said property and all thereof, and your said orator The American Water Works Company (of New Jersey,) and your said orator the Receiver (since the date of his appointment) have been and now are in the continuous possession and occupation of the same and all thereof.

6. And your orators say that the defendants Clarence H. Venner, Frederick H. Mills and Delos A. Chappell, and more particularly the defendants Clarence H. Venner and Delos A. Chappell, claim
277 an estate or interest in said premises and all thereof adverse to the complainants' right, which said claim your said orators now respectively show to this court is void of equity and was most wrongfully and fraudulently asserted, for inasmuch as your orators say that in the year 1888, the said The American Water Works Company (of Illinois) owned said water works plant in the County of Douglas and State of Nebraska, and was engaged in the business of supplying water thereby to the Cities of Omaha, South Omaha and Florence in said County of Douglas and State of Nebraska, and while so engaged, and in the month of December, 1888, or thereabout, the said The American Water Works Company (of Illinois) found it to be necessary that it should own the aforesaid described property and all thereof, for the purpose of erecting and constructing thereon a settling basin and reservoirs, as well also for the purpose of completing the construction of its pumping house and stations that at this time the defendant Clarence H. Venner was a member of the firm of C. H. Venner & Co., in the city of New York, engaged in the investment and banking business and as such were for a long time prior thereto had been the fiscal agents of the said The American Water Works Company (of Illinois) handling and having for said company large sums of money; that in addition thereto the said defendant Clarence H. Venner was a large stockholder in the said The American Water Works Company (of Illinois) as well also as its Vice-President, and one of the directors of said company, and during this time the defendant Frederick H. Mills was an employee of the said C. H. Venner & Co., in an office

which the said C. H. Venner & Co., then had in the City of Boston and State of Massachusetts.

7. Your orators say that the negotiations for the purchase of said property were conducted by one William A. Underwood, the President of the said The American Water Works Company (of Illinois) and a person who at that time together with the defendant Clarence H. Venner, composed the firm of C. H. Venner & Co., that in the negotiations for said property it became necessary to acquire title to the same through one Victor G. Lantry and others, and the said William A. Underwood purchased the same for the consideration of \$3675.00, \$2500.00 was to be paid in cash and \$1175.00 was to be paid on January 1st, 1889; that in conducting the negotiations for said purchase, the said Underwood acted for and on behalf of the said The American Water Works Company (of Illinois) alone, and made the purchase for said company, but that in having the conveyance made by said Lantry of said property, *the said property*, the said Underwood caused the said Lantry to deed the same by deed of general warranty to the defendant Frederick H. Mills, and
278 the consideration was paid to said Lantry by the said Lantry making two drafts upon the said Mills one dated December 11th, 1888, for \$2500.00 and the other dated January 4th 1889, for \$1175.00 and thereupon the said Lantry made a deed of general warranty conveying said property and all thereof to the said Frederick H. Mills.

8. And your orators further say that the said Frederick H. Mills paid no part of the consideration for said property but when said drafts were made by said Lantry upon said Mills and presented for payment, the same were paid by the firm of C. H. Venner & Co., the fiscal agents of the said The American Water Works Company (of Illinois) and by said C. H. Venner & Co., charged to the account of said The American Water Works Company (of Illinois;) that said Mills by express agreement and arrangement so made between the parties at that time, received the deed from said Lantry to himself with the distinct agreement that he, the said Mills, would immediately convey said property to said The American Water Works Company (of Illinois) the actual owner thereof, and on December 21st, 1888, the said Mills did in fact by himself, and his wife joining therein, execute a deed to the said The American Water Works Company (of Illinois) conveying the aforesaid lots and property and all thereof to said The American Water Works Company (of Illinois) and the said deed was immediately after its execution, delivered to the said C. H. Venner & Co., to be delivered to said The American Water Works Company (of Illinois) upon the payment by it of the amount paid for said lands with interest, and thereupon, immediately after the execution of said deed, the said The American Water Works Company (of Illinois) went into the actual possession and occupation of said lands and all thereof, made large improvements thereon, sank its reservoirs, and settling basins upon a large portion thereof, and the said lands ever since have been and are now so used and have been so occupied by the said The American Water Works Company (of Illinois) until the date of its deed aforesaid to your orator The

American Water Works Company (of New Jersey); that thereafter the money so advanced by said C. H. Venner & Co., to said The American Water Works Company (of Illinois) for the purpose of paying for said lands, was paid by said company to said C. H. Venner & Co., and your orators further say that the said C. H. Venner & Co., and particularly the defendant Clarence H. Venner, well knowing that the said lots and all thereof were so possessed and occupied by said The American Water Works Company (of Illinois) received and held said deed with the agreement that he and the said C. H. Venner & Co., would deliver said deed to said The American Water Works Company (of Illinois) upon the payment of the money which had been advanced by said C. H. Venner & Co., to pay for said lands, to-wit: \$3675.00 with interest until the date of payment by said Water Works Company.

9. Your orators are unable to state positively that said The American Water Works Company (of Illinois) has paid said money to said C. H. Venner & Co., but upon information and belief your orators allege that said money has long since been paid by said The American Water Works Company (of Illinois) to said C. H. Venner & Co., for inasmuch as your orators say that since the date of the advancement of said money by said C. H. Venner & Co., there have been divers and various settlements of accounts between said C. H. Venner & Co., and the said The American Water Works Company (of Illinois) and your said orators are advised and informed, and therefore charge the fact to be that in said settlements the said The American Water Works Company (of Illinois) was charged with said money and interest so advanced by said C. H. Venner & Co., and said C. H. Venner & Co., thereby duly received all of said money from said water works company, but your orators say whether this be true or not, the said C. H. Venner & Co., never at any time, made demand for said money or any part thereof, and the said The American Water Works Company (of Illinois) up to the date of its conveyance of your said orator The American Water Works Company (of New Jersey) has at all times been ready and willing to make payment of said money and interest to said C. H. Venner & Co., and since the date of its conveyance to your said orator The American Water Works Company (of New Jersey) your said orators have at all times been ready and willing to make good said amount with interest thereon to said C. H. Venner & Co., and if upon inquiry, this court shall ascertain the fact to be that the said money has not in fact, with all interest thereon, been paid to said C. H. Venner & Co., then and in such event your said orators offer and tender into court the full amount of said sum of \$3675.00 with interest thereon from the date the same was advanced by said C. H. Venner & Co., to and for the said The American Water Works Company (of Illinois).

10. And your orators say that the said C. H. Venner & Co., with the unlawful design to wrong and defraud your said orators, and with the intention and purpose of greatly impairing the value of the property of your said orators and in order to slander the title to the property of your said orators and cast a cloud thereon, did fail to deliver said deed so made by the said Mills and wife to the

aforesaid The American Water Works Company (of Illinois), and well knowing that the same was the property of your said orators, did fraudulently mutilate and destroy said deed so
280 executed by the said Mills and wife to the said The American Water Works Company (of Illinois) and the said Clarence H. Venner in pursuance of his unlawful and fraudulent purpose aforesaid, did, on or about the 1st day of November, 1892, falsely and fraudulently represent to his said co-defendant Frederick H. Mills that the said property had never been paid for and that the said Venner was the owner of said property and that the same was not the property of your said orators, and by reason thereof did procure the said Mills to execute to the defendant Delos A. Chappell, for a consideration of \$1.00 a quit claim deed to the said lots and all thereof, and thereafter caused said Mills to deliver said quit claim deed to said Venner, whereupon the said Venner, by a fraudulent arrangement between himself and said Chappell, delivered said deed to said Chappell, and the said Chappell caused the same, on October 6th, 1892, to be recorded in the office of the Register of Deeds in and for Douglas County, Nebraska.

11. And your orators say that the said Venner and said Chappell and said Mills, each and all of them at the time of the execution of said quit claim deed to said Chappell, well knew that your said orators were in the possession of said property and occupying the same as their own, denying the right of any other person to any interest whatever therein, and they and each of them further well knew that said Mills did not own said property but only the naked title thereto, and that said Mills held the same in trust for your said orators and for the creditors of your said orators; that there was no consideration for the making of said deed by said Mills to said Chappell, and the deed from said Mills to said The American Water Works Company (of Illinois) was destroyed and the same mutilated and the name of the grantee therein erased, and that of defendant Chappell inserted and said deed made to said Chappell for the purpose of placing the paper title to said property in said Chappell, and in order to enable him and said Venner, and each of them, thereby to defraud, harm and wrong your said orators and cause great damage, injury and mischief to its properties and credit.

12. Your orators further say that they did not discover the facts with respect to this transaction until about the month of February, 1893, when they demanded at the hands of the said C. H. Venner & Co., the return of said deed so executed by said Mills to said The American Water Works Company (of Illinois) but the said Venner has refused to make any response whatever to said demand, though your orators charge the fact to be that he, the said Mills, now has in his possession the original of said deed, although it is
281 mutilated and practically destroyed as a deed by reason of the erasure of the name of the grantee therein as hereinbefore alleged.

13. And your orators say that the said property and all thereof is of the value of more than \$5000.00; that your said orators by virtue of their purchase from said The American Water Works Com-

pany (of Illinois) and their occupation and possession of said premises are the owners of said property and are entitled to have and to hold the same as against the said defendants and as against either of them; that the said defendants Clarence H. Venner and Delos A. Chappell, and particularly the latter, is endeavoring to obtain possession of said property, and all thereof, and the said Chappell is threatening your said orators with suits for the possession of said property, and for rents for the use and occupation thereof, and unless restrained by the orders of this court, the said Chappell will institute and prosecute such actions to the great harm, damage and detriment of your said orator-.

All of which said actings, doings and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

In consideration whereof and for as much as your said orators can only have adequate relief in the premises in this honorable court where matters of this nature are properly cognizable and [relievable], your orators pray that your said orator The American Water Works Company (of New Jersey) may be decreed and adjudged to be the true owner and holder of the said property and all thereof and of right entitled to a conveyance of the same, and that unless the said defendants convey the same to your orator The American Water Works Company (of New Jersey) within a time to be specified by this court, that this court by its Master direct a conveyance of said property to your said orator The American Water Works Company (of New Jersey), and your said orators further pray that the title to said property may be quieted in your said orator The American Water Works Company (of New Jersey) and that your said orators may have such other and further relief in the premises as the nature and circumstances of this case may require and to this honorable court shall seem meet.

And may it please your Honors to grant unto your orators the writ of injunction issuing out of and under the seal of this court, or issued by one of your honors, according to the form of the statute in such cases made and provided, directed to the said Clarence H. Venner,

282 Frederick H. Mills and Delos A. Chappell, commanding, enjoining and restraining said defendants, and each and every of them, from ever at any time asserting any right or claim to said property or any part thereof, or from bringing any action to recover possession of the same or any part thereof, or from in any way interfering with your said orators in the use and occupation of said property and all thereof.

And may it please your Honors to grant unto your orators a writ of subpoena of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Clarence H. Venner, Frederick H. Mills and Delos A. Chappell, defendants, commanding them on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, but not under oath, an answer under oath being hereby expressly waived, and to stand to,

perform and abide such further order, direction and decree as may be made against them.

And your orators as in duty bound will ever pray.

CHAS. OFFUTT,
Solicitor for Complainants.

CHAS. OFFUTT,
Of Counsel.

UNITED STATES OF AMERICA,
State of Nebraska, County of Douglas, ss:

On this 26th day of April, 1893, personally appeared before me, E. Hyde Rust, who, having been first duly sworn, deposes and says that he is the same E. Hyde Rust named as one of the plaintiffs herein; that he knows the contents of this Bill of Complaint and that the same are true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to said matters he believes them to be true.

E. HYDE RUST.

Subscribed in my presence and sworn to before me this 26th day of April, 1893.

[SEAL.]

FRANCIS J. MIEDING,
Notary Public.

Endorsed: Filed Apr. 27, 1893. Elmer D. Frank, Clerk.

In the Circuit Court of the United States within and for the District of Nebraska.

283 E. HYDE RUST, Receiver of the American Water Works Company (of New Jersey), and The American Water Works Company (of New Jersey), Complainants,

vs.

CLARENCE H. VENNER, FREDERICK H. MILLS, and DELOS A. CHAPPELL, Defendants.

The Joint and Several Answer of Clarence H. Venner and Delos A. Chappell, Two of the Defendants, to the Bill of Complaint of the Above Named Complainants.

In answer to the said Bill of Complaint these defendants, by leave of court first had and obtained, severally, and each for himself, answer (but not under oath, their answers under oath having been expressly waived) as follows:

These defendants deny that the complainant the American Water Works Company (of New Jersey) was organized in February, 1891, or that at any time it ever was or became a valid corporation, or lawfully incorporated; but these defendants believe it to be true that the so-called corporation has been engaged in the operation of a system of water works in the cities of Omaha, South Omaha and

Florence, in the County of Douglas and State of Nebraska, and that on the 20th day of July, 1892, the plaintiff E. Hyde Rust was appointed receiver of said pretended corporation by some court in the state of New Jersey, and thereupon gave bonds and duly qualified as such receiver, and acted as such receiver until his removal as hereinafter set forth; but these defendants expressly deny that the said so-called American Water Works Company (of New Jersey) is now, or at any time has been the owner of [—] system of water works so as aforesaid operated by it, but on the contrary thereof these defendants say that the same and every part thereof (excepting the lands in said bill specifically described) always has, and now does, belong to a certain corporation known as the American Water Works Company (of Illinois), which is a body corporate duly organized under, and existing by virtue of, the laws of the State of Illinois.

And these defendants further answering admit that on the 22nd day of August, 1892, the complainant Rust applied unto this honorable court for the custody, control and possession of all the properties and assets of the said The American Water Works Company (of New Jersey) situated within the District of Nebraska.

And these defendants further answering allege that thereafter, to-wit: On the 23rd day of September, 1892, such proceedings were had upon said application that an order was issued out of this honorable court decreeing that the said E. Hyde Rust be recog-

284 nized and appointed as the receiver of the said so-called corporation The American Water Works Company (of New Jersey) and be entitled to demand, sue for, collect, receive, and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the said The American Water Works Company (of New Jersey) as by reference to the records of this court will more fully and at large appear; and these defendants allege that under and by virtue of said order, and without any other right or authority whatsoever, the said Rust took possession of the said entire system of water works, which then belonged to the said American Water Works Company, (of Illinois) and of all the real estate hereinafter described, and held and operated said water works system until on or about the 15th day of July, 1893, when he was, by a further order of said last above named court in the same proceedings, suspended and removed from said receivership so far as relates to the said system, and the lands in controversy in this action; and these defendants further or otherwise than as aforesaid, deny it to be true that the said Rust was on the 18th day of October, 1892, or on any other day, placed in possession of the entire system of water works aforesaid in the County of Douglas and State of Nebraska, including the property in said bill more specifically described; and these defendants allege that the said order of court conferred no authority upon the said Rust to take possession of said system of water works, or any part thereof, for the reason that the same did at that time, and now do, in law and in equity belong to the American Water Works Company (of Illinois) as hereinbefore alleged, and as hereinafter more

in detail set forth, which said last named corporation was not a party to the said action in which the said order was entered; and that the said order conferred on the said Rust no authority or right whatsoever to take possession of the lands hereinafter described, for the reason that the same were then and now are, the property of the defendant Chappell, who held and now holds both the legal and equitable title to the same as will more fully hereinafter appear. Wherefore these defendants say that the said possession of the premises hereinafter described, by the said Rust was wrongful and unlawful and conferred upon the plaintiffs in this cause no rights whatever as against these defendants or either of them.

And further answering these defendants say that under date of the 24th day of April, 1891, the American Water Works Company (of Illinois) pretended to execute and deliver to the said 285 plaintiff the American Water Works Company (of New Jersey) so-called a certain deed purporting to sell and convey to the last named party certain chattels and real estate therein named, which chattels and real estate included all the property, real, personal and mixed, at that time in any manner belonging to or owned by the American Water Works Company (of Illinois) and which also included the premises hereinafter named; and under the same date and as part of the same transaction the said American Water Works Company (of Illinois) pretended to execute and deliver to the American Water Works Company (of New Jersey) so-called, its certain other deed of conveyance purporting to sell and convey to the last named party all and singular the franchises, contracts and choses in action then belonging or to belong to the said American Water Works Company (of Illinois) by which two deeds the last named corporation attempted to deprive itself of all its corporate property, franchises, rights and powers, and to vest the same in the said American Water Works Company (of New Jersey) so-called, which said deeds were recorded in the office of the Register of Deeds of Douglas County, Nebraska, in Book 157 of deeds, at page 195, and Book 10 of Miscellaneous, record at page 430, respectively, certified copies of which said deeds these defendants will produce on the hearing hereof; and these defendants allege that the said complainants have no other title or right to said premises hereinafter described except such as is pretended to be conveyed by said deeds. And these defendants, further or otherwise than as above set forth, deny that it is true that the American Water Works Company (of New Jersey) by a deed of general warranty of date April 24th, 1891, for a valuable consideration actually paid, acquired and purchased from said The American Water Works Company (of Illinois) all of the said Omaha system of water works, including all of its real and personal property of every kind and description situated in the district of Nebraska, the County of Douglas and State of Nebraska, and that on the 24th day of April, 1891, the said The American Water Works Company (of Illinois) conveyed said property by deed of general warranty to the American Water Works Company (of New Jersey).

And these defendants further answering say that the said deeds

and each of them were and are null and void and wholly inoperative to vest in the complainants any title to the premises herein-after described for the reason that The American Water Works Company (of Illinois) was and is a corporation organized and existing under the State of Illinois for the purpose of owning, maintaining and operating a system of water works to supply water for 286 municipal and private purposes to the cities of Omaha, Florence, and South Omaha in Douglas County, Nebraska, and to the inhabitants thereof, and as such corporation, at the time of said attempted transfer, was using and enjoying the exclusive franchise for the supplying of water for all public and private uses to the said cities and their inhabitants, and, as a public duty was supplying the said cities and inhabitants with water under unexpired and subsisting contracts with the municipal governments of the cities aforesaid, and while so engaged in the performance of its said public duty as aforesaid, was without authority or right or power to wholly strip and deprive itself of all its property and all the means and appliances essential to such performance, which would be the immediate and inevitable result of giving force and effect to the said deeds of conveyance.

And these defendants further answering say that the said deeds and each of them were and are wholly illegal and void and confer no title nor rights upon the complainants for the further reason that the said American Water Works Company (of Illinois) under its charter and articles of incorporation was without power or authority of law to make the said deeds or either of them, and to transfer the property and franchises and rights therein named to the pretended grantee therein, and was without power or authority of law to surrender to any other party or corporation its obligation to carry on, maintain and operate its said water works system in said Douglas County, Nebraska, which surrender would be the immediate and inevitable result of giving force and effect to the said deeds.

And these defendants further answering say that the said deeds and each of them were and are wholly illegal and void and confer no title nor rights upon the said complainants for the further reason that the organization of the said American Water Works Company (of New Jersey) was unauthorized by the laws of the State of New Jersey and that the sole purpose and object of said organization was to consolidate and operate under one management the entire water works system of the American Water Works Company (of Illinois) in the State of Nebraska, and the entire water works system of a certain other corporation known as the Denver City Water Works Company in the State of Colorado, which purpose and object was contrary to, and in violation of, the laws of the State of New Jersey, and the so-called American Water Works Company (of New Jersey) was and is without right, power or authority to purchase or receive deeds of the property of the American Water Works Company (of Illinois) or to take possession and control of such property, and was and is without right, power or authority to take upon itself the contracts, franchises and obligations of the said The American Water Works Company (of Illinois).

And further answering these defendants say that said deeds and each of them were and are wholly illegal and void and confer no title nor rights upon the said complainants for the reason that the same were executed and delivered in the State of Colorado, which was not the state in which the said American Water Works Company (of Illinois) then had its domicile, or any office, or place of business, nor the state in which the said property, or any thereof, was at any time located.

And these defendants further answering say that the said deeds and each of them were and are wholly illegal and void and conferred no title nor rights upon the said complainants for the further reason that the purported consideration was illegal and unauthorized, inasmuch as the said American Water Works Company (of New Jersey) undertook and agreed to pay the said American Water Works Company (of Illinois) for the properties and things named in said deeds \$6,000,000 in the stock of the American Water Works Company (of New Jersey) which amount was largely in excess of the value of the property pretended to be purchased, over and above the bonded debt charged thereon, and such payment was contrary to and in violation of the laws of New Jersey, and the stock issued to make such payment was illegally issued and of no value on that account; and for further reason that the Board of Directors attempting to make such purchase, and pretending to receive and accept said deeds was not a legal Board of Directors, inasmuch as a majority thereof were not bona fide stockholders of said American Water Works Company (of New Jersey), as required by the laws of said State — New Jersey. And these defendants further, or otherwise than as aforesaid, deny that it is true that the so-called American Water Works Company (of New Jersey) and the said Rust, by virtue of said deeds, and by virtue of said appointment as receiver, acquired and obtained the title to any real estate whatever in said Douglas County, Nebraska, but these defendants admit that the American Water Works Company (of New Jersey) so-called, at the date of said deeds took the possession and occupation of the several lots named in said bill and since retained such possession and occupation by itself or its said receiver until the removal of the latter as aforesaid, which said possession and occupation these defendants say, as they have above said, was wrongful and illegal, and conferred on the complainants no rights whatever as against these defendants.

288 And these defendants further answering admit that they claim an estate or interest in the premises named in said bill adverse to the complainants, but deny that such claim is void in equity and deny that it is wrongfully and fraudulently asserted.

And these defendants further answering admit that in the year 1888 the American Water Works Company (of Illinois) owned said water works plant in Douglas County, and was engaged in the business of supplying water thereby to the cities of Omaha, South Omaha and Florence, and that the defendant Venner was at that time a member of the firm of C. H. Venner & Company in the City of New York engaged in the investment and banking business, and that the said Venner was a stockholder in the said American Water

Works Company (of Illinois) and that the said defendant Mills was an employee of the said C. H. Venner & Company; but these defendants deny that in the month of December, 1888, or at any time, the said American Water Works Company (of Illinois) found it necessary that it should own the real estate in said bill, and herein-after, described, or any thereof for the purpose of erecting and constructing thereon a settling basin and reservoirs, or of completing its pumping house stations; and these defendants deny that the said firm of C. H. Venner & Company were at the date last named or at any time, the fiscal agents of the said American Water Works Company (of Illinois) or handled, or had, for said last named corporation large sums of money; and these defendants also deny that the said defendant Venner was, at, or near, the date last aforesaid the Vice-President of said Illinois corporation.

And these defendants further answering say that at some time in the fall of the year 1888, the said American Water Works Company (of Illinois) desired to enlarge its plant and to relocate its principal works at some point on the Missouri river north of the place upon which the same were originally built and had hitherto remained; that one William A. Underwood, who was then the President of the Illinois corporation, at that time represented to the said defendant Venner's firm, that the following described premises (which are the same premises particularly described in the complainants' said bill) were suitable for the relocation of the said corporation's plant, but that the company was totally without the financial means for acquiring the same, and asked the said firm of C. H. Venner & Company to buy the said lands and to take the title thereto, and to license the said Illinois corporation to enter upon and to use the said premises in carrying out its plans of enlarge-

289 ment and relocation and promised the said C. H. Venner & Company that at some future time an arrangement satisfactory to it would be made touching the transaction; and that there-

upon one Victor G. Lantry, who was a real estate agent and dealer, the owner of the property in the vicinity of the proposed location, and well acquainted with values and ownerships there, was employed to buy, in behalf of, and for, the said C. H. Venner & Company, and for none other, the following described premises, to-wit:

Block No. nine (9); lot five (5) in Block one (1); Lot four (4) in Block thirty-nine (39); Lots five (5) six (6) seven (7) and eight (8) in Block thirty-eight (38); Lots six (6) and seven (7) in Block twenty-nine (29); Lot two (2) in Block eighteen (18); Lot six (6) in Block nineteen (19); Lot eight (8) in Block forty-nine (49); and the south half ($\frac{1}{2}$) of Lot four (4) in Block fifty-one (51) situated in the Town of Florence, Douglas County, Nebraska, according to the plat of said Town of Florence as lithographed and recorded, together with all the tenements, hereditaments and appurtenances to the same belonging.

And these defendants further answering say that the said Lantry purchased the premises above described for the sole use and benefit of the said C. H. Venner & Company, taking title thereto in his own name from time to time as purchases were made, until all of said pur-

chases were completed, whereupon the said Lantry was paid by the said C. H. Venner & Company the sum of Four thousand seven hundred and seventy five dollars in return for the total amount of money by him expended, as well as for his services, in that behalf, and made his deed and conveyance, duly executed, witnessed, acknowledged and delivered, conveying said premises to the defendant Mills, who thereby received the legal title thereto in trust for the sole use and benefit of the said C. H. Venner & Company, and who never has at any time held the title to any part of said premises otherwise than as such trustee.

And these defendants further or otherwise than as above stated, deny it to be true that the negotiations for the purchase of the said property were conducted by one William A. Underwood, the President of the American Water Works Company (of Illinois) and a person who at that time together with the defendant Venner composed the said firm of C. H. Venner & Company and that in the negotiations for said property it became necessary to acquire title to the same through the said Lantry and others and that the
290 said Underwood purchased the same for the consideration of \$3,675 and that in having the conveyance of said property made by said Lantry the said Underwood caused the said Lantry to deed the same to the defendant Mills. And these defendants expressly deny that in conducting the negotiations for said purchase the said Underwood acted for and on behalf of the said American Water Works Company (of Illinois) either alone or in part, and expressly deny that the said Underwood made said purchase for said company, and expressly deny that the negotiations for said purchase were conducted by the said Underwood, but on the contrary these defendants allege that said negotiations were conducted solely by the said Lantry, who, as above stated, acted exclusively as the agent of the said firm of C. H. Venner & Company. And these defendants admit that the said defendant Mills paid no part of the consideration for said property, and that the same was paid by the said C. H. Venner & Company; but these defendants deny, as they have above denied, that the said C. H. Venner & Company were then, or at any time, the fiscal agents of the said Illinois corporation, and they deny that the consideration so paid as aforesaid, or any part thereof, was ever charged by the said C. H. Venner & Company to the account of the said American Water Works Company (of Illinois) and they further deny that the said Mills by any agreement or arrangement, express or otherwise, at any time made, received the Lantry deed with any agreement that he, the said Mills, would convey said property to said American Water Works Company (of Illinois).

And these defendants further answering say, that at some time in December 1888, the said C. H. Venner & Company, thinking that the Illinois corporation might make some proposition which would be satisfactory to said firm for the purchase of said lands from them caused the said Mills, as such trustee as aforesaid, to draw up and sign a deed of said premises in which the said Illinois corporation was named as grantee, which deed when signed was left in the hands and control of the said C. H. Venner & Company, as the real

grantors, and was in no sense delivered to them as agents for the said American Water Works Company (of Illinois) and these defendants say that they caused said deed to be executed solely as a matter of convenience to themselves, for use in case an agreement relating to the sale of said lands to the said Illinois corporation should be made between the latter and the said firm, and that no such agreement was ever reached, and the said C. H. Venner & Company were entitled to keep or destroy said deed as a private paper of their own, in the existence of which no one else had any interest whatever; and that the said deed never passed out of their possession; and these defendants further or otherwise than as above stated deny it to be true that the said Mills executed any deed to the said American Water Works Company (of Illinois) conveying the said lots and property, or any thereof, to the latter corporation; and these defendants expressly deny that the said deed was delivered to the said C. H. Venner & Company to be delivered to the American Water Works Company (of Illinois) upon the payment by it of the amount paid for said lands with interest, or upon any contingency except as above stated.

But these defendants admit that the said American Water Works Company (of Illinois) at about the time last mentioned went into actual possession of said premises, and constructed reservoirs, settling basins and other improvements thereon, and that said lands ever since have been occupied by the said Illinois corporation and the complainants, but these defendants allege that such possession and occupation by the said Illinois corporation was solely under and by virtue of the license and permission of the said C. H. Venner & Company as the exclusive owners thereof, and that the possession and occupation thereof by the complainants in this cause was and is, as above stated, wrongful, and without authority of law.

And these defendants further answering expressly deny that the said American Water Works Company (of Illinois) or any other person or corporation, has ever paid to said firm of C. H. Venner & Company any sum of money whatever on account of said lands, either as repayment of the original purchase price or otherwise; and they deny that either the said Venner or the said C. H. Venner & Company ever received or ever held the said Mills deed under any agreement, express or implied, for the delivery of the same to the said Illinois corporation under any circumstances whatever. And these defendants say that while it is true that there have been divers and various settlements of accounts between C. H. Venner & Company and the said American Water Works Company (of Illinois) since the date of the purchase of the said lands, it is not true that in said settlements, or in any thereof; the American Water Works Company (of Illinois) was charged with any money paid by said C. H. Venner & Company for said lands or any part thereof, nor that in any way or from any person or corporation the said firm has received any payment for said lands; but these defendants admit that the said C. H. Venner & Company never made any demand for said money nor any part thereof, and allege that said firm has never been entitled to demand any money for said land from said corporations for the reason

that it never sold the same to them or either of them, but has
292 continued at all time to be the sole and exclusive owners
thereof, in law and in equity, except as hereinafter stated.
But these defendants do not know, and cannot say, whether or not
it be true that the American Water Works Company (of Illinois)
up to the date of its pretended conveyance to the complainant corporation,
and since that time, the American Water Works Company
(of New Jersey) have been ready or willing to make good to the
said C. H. Venner & Company the money by said firm paid for said
lands, and therefore leave the complainants to make such proof
thereof as they may be able to produce on the hearing of the said
cause.

And further answering these defendants deny any design on the
part of the said C. H. Venner & Company to wrong or defraud the
said complainants, and any intent or purpose of impairing any
property of the complainants, and of slandering or clouding the
titles of any property belonging to the complainants, and deny that
they have in fact done any such wrong, fraud or impairment, or
uttered any such slander, or cast any such cloud, and allege that not
further or otherwise than as above stated did the said C. H. Venner
& Company fail to deliver the said Mills deed; and these defendants
deny that the said deed ever was the property of the said American
Water Works Company (of Illinois), but they say that the said
Illinois corporation, having wholly failed to make any arrange-
ment with the said C. H. Venner & Company as to the purchase of
said land from said firm, thereafter, namely, on or about the first
day of November 1892, the said defendant Mills was directed by the
said C. H. Venner & Company to execute a deed of said lands to
said defendant Chappell, which was accordingly done, and the said
deed when executed was delivered to the said defendant Chappell,
who thereby became vested with the real ownership, the equitable
right, and the legal title to the said premises which from that time
hitherto has remained, and still is, in him the said defendant Chap-
pell. And these defendants further say that for the purpose of
making convenient memoranda for the drafting of said deed to said
Chappell, the undelivered and inoperative deed previously executed
by the said Mills to the said American Water Works Company (of
Illinois) was taken, and the changes required were thereon written
in pencil, all of which the said C. H. Venner & Company might
lawfully do, as the said deed so written upon, as well as all the land
therein described, was the exclusive property of the said C. H. Venner
& Company, without any lien or claim thereon or thereto in favor
of any person or corporation whatsoever; which said deed, so made
as aforesaid, was duly recorded in the office of the Register of Deeds
of Douglas County, Nebraska, and which said deed, or a duly
293 certified copy thereof, will be produced on the hearing hereof;
and these defendants further say that the said last named deed
was executed and delivered, and the property therein named con-
veyed, to the said [said] defendant Chappell for a valuable, adequate
and bona fide consideration from him moving to the said C. H.
Venner & Company, to-wit: the sum of Fifteen Thousand Dollars,

therefor paid. And these defendants, further or otherwise than as above stated, deny it to be true that the said defendant Venner procured the said defendant Mills to execute to the defendant Delos A. Chappell, for a consideration of one thousand dollars (\$1,000) a quit claim deed to said lots, and caused said Mills to deliver said quit claim deed to said Venner, whereupon by a fraudulent arrangement between himself and the said Chappell, the said defendant Venner delivered said deed to said Chappell. And these defendants say that it may be true that the defendant Venner at that time and in that connection represented to the defendant Mills that the property had never been paid for by the American Water Works Company (of Illinois) nor by any one in its behalf, and that the said Venner was the owner thereof, and that the same was not the property of the said complainants, for such statements and each thereof, whether then made or not made, were true.

And these defendants further answering admit that the said defendants knew at the time of the execution of the deed last named, that the complainants were in the possession and occupancy of said lands, and that the said Mills did not own said property but only the legal title thereof, but they deny that they or either of them then knew, or that the fact was, that either of the said complainants claimed the same as their own, or denied the right of any other person therein; and that the said Mills held the same in trust for the complainants and their creditors; and that there was no consideration for the making of said deed to Chappell; and that the said prior deed from Mills to the Illinois corporation was destroyed, mutilated or in any part erased and altered (further or otherwise than as aforesaid) and that the deed was made to Chappell for the purpose of putting the paper title to said property in said Chappell in order to enable him and the said Venner to defraud, or harm, or wrong the complainants, or to cause damage, mischief or injury to the complainants' property or credit.

And these defendants do not know when the facts with respect to the aforesaid transactions came to the knowledge of the complainants, nor if it be true that the so undelivered and inoperative deed
294 from the said Mills to the said American Water Works Company, (of Illinois), is still in the hands of the said Mills, and leave the complainants to make such proof thereof as they may be able to produce on the hearing hereof, but they admit it to be true that the complainants demanded the said so-called deed from C. H. Venner & Company and that the latter ignored such demand, as they had a right to do.

And these defendants further answering admit that the said property is of the value of more than five thousand dollars (\$5,000) but they deny it to be true that the complainants by virtue of any purchase from the said American Water Works Company (of Illinois) or otherwise, or of their occupation and possession thereof, are the owners of said property and are entitled to have and to hold the same as against the said defendants.

And these defendants say that the said defendant Chappell at all times and in all places, asserts his ownership and right of possession

of the said lands, and stand ready to maintain by all lawful means his claims thereto and his claims for just compensation for the wrongful taking, possession and continued occupation thereof by the said complainants; but these defendants further or otherwise than as aforesaid, deny it to be true that they or either of them are endeavoring to obtain possession of said property, or are threatening the complainants with suits for the possession thereof, and for rents for the use and occupation thereof. Forasmuch as these defendants deny the validity of the alleged conveyances from the said American Water Works Company (of Illinois) to the American Water Works Company (of New Jersey) which denial is one of the material issues in this cause, and forasmuch as the said American Water Works (of Illinois) claims the ownership of and the right of possession to the premises in controversy herein, under the same title which the complainants set forth, in order that complete justice may be done by the final decree herein, and that a multiplicity of suits may be avoided, these defendants ask that the said American Water Works Company (of Illinois) may be made a party defendant to the said bill and required to set forth its claim to the premises in said bill described.

And these defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred to the said Bill of Complaint.

And these defendants deny all and all manner of unlawful acts wherewith they are by the said bill charged, without this, that there is any other matter, cause or thing in the said complainants' 295 said Bill of Complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CLARENCE H. VANNER,
DELOS A. CHAPPELL,
W. J. CONNELL,

Of Counsel.

Endorsed: Filed Sep. 5, 1893. Elmer D. Frank, Clerk.

In the Circuit Court of the United States for the District of Nebraska.

E. HYDE RUST, Receiver of the American Water Works Company of New Jersey, and American Water Works Company of New Jersey, Complainants,

vs.

CLEARANCE H. VENNER, FREDERICK H. MILLS, and DELOS A. CHAPPELL, Defendants.

Order.

This cause this day duly came on to be heard in open court upon the application of the parties hereto — set aside the order of dismissal herein, and to revive and reinstate said cause upon the dockets of said court in the name of the successor of the complainants, and against the said original defendants, both parties being present and represented in court by their respective solicitors, and consenting thereto, and thereupon, by consent of said respective parties, and the Court being fully advised in the premises, it is now here

Ordered by the court that the order of dismissal herein, heretofore entered, be, and the same is hereby vacated, and set aside, and said cause is restored to the dockets of the court.

And it further appearing to the court that the Omaha Water Company has succeeded to the interest of the original complainants herein, it is therefore now here

Ordered by the court that the said Omaha Water Company, a corporation of the State of Maine, be substituted as complainant in lieu and instead of said original complainants.

296 And it further appearing to the court that the defendants Clarence H. Venner, Frederick H. Mills, and Delos A. Chappell, or one or more of them, claim to have a right, title, or interest in and to the property and real estate described in the complainant's bill of complaint, and that in order to conserve said interest, and obtain full justice in the premises, it may be necessary for them, or anyone of them, to file a cross-bill herein and it further appearing to the court that the said parties hereto have agreed with each other that for a consideration satisfactory to said parties it is understood between them that the said defendants, or anyone or more of them, may have leave herein to file a cross-bill, and that said cross-bill when filed shall, as between the parties hereto, be deemed as filed, and as the commencement of a suit by the said cross-complainant as of the date of the original commencement of this suit. It is therefore now here further

Ordered by the court that the said defendants, and each and every one of them have leave to file herein, within thirty days after the filing of the amended original bill herein of the said Omaha Water Company, as complainant, to file a cross-bill, and that the action set forth in said cross-bill shall be deemed to have been commenced on the date of the original commencement of this suit. It is further

Ordered that the complainant have leave to file an amended origi-

nal bill herein, within twenty days from this date, a carbon copy of said original bill to be furnished to the solicitor for the defendants Feb. 14th, 1900.

O. K.

R. S. HALL.

W. H. MUNGER, *Judge*.

Endorsed: Filed Feb. 14, 1900. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: There was offered in evidence in the Case of Omaha Water Company vs. City of Omaha, et al. No. 74 Docket "X", the following papers and proceedings in the case of Farmers' Loan & Trust Company vs. The American Water Works Company of Illinois, et al., No. 96 Docket "Q".

Bill of Complaint and Exhibits A and B attached thereto;

Answer of American Water Works Company of Illinois, and of the American Water Works Company of New Jersey; Amendment to answer of American Water Works Company of Illinois and of American Water Works Company of New Jersey; Report of J. D. 297 Cook, Engineer and Appendix thereto; Ordinance No. 445; Ordinance No. 469; Ordinance No. 618; Order making Decree of Circuit Court conform to decree of Circuit Court of Appeals; Master's Report of Sale; Order of Confirmation; Order directing Receivers to turn over property to purchaser, and Order directing Master to execute a deed to Farmers' Loan & Trust Company, and Master's Report of Deed, which said papers [are] proceedings are in words and figures following, to-wit:

(Decree in above case found on page 1270 of this Record.)

To the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Sitting in Equity.

The Farmers' Loan and Trust Company, a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, having its principal office and place of abode in the City of New York, brings this, its bill of complaint, against the American Water Works Company, a corporation organized and existing under the laws of the State of Illinois, a citizen of the State of Illinois, and having its principal office and place of abode in City of Chicago, in said State of Illinois, The American Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, and a citizen of the State of New Jersey, and having its principal office and place of abode in the City of Jersey City, in said State of New Jersey, and E. Hyde Rust, as Suspended Receiver of The American Water Works Company, a citizen and resident of the State of New Jersey, and Alonzo B. Hunt, temporary Receiver of the American Water Works Company, a citizen and resident of the State of Nebraska.

And thereupon your orator complains and says:

I. Your orator is a corporation, bearing the corporate name of The Farmers' Loan and Trust Company, duly created under the laws of the State of New York, and as such corporation is fully au-

thorized and empowered to hold in trust the property conveyed to it in trust, as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgages or deed of trust hereinafter described.

II. The defendant The American Water Works Company, the Illinois corporation (hereinafter called the Mortgagor Company) is a corporation organized and existing under and by virtue of the laws of the State of Illinois, for the purpose of building, 298 equipping and operating water works to supply water to cities, towns, villages, municipal and other corporations; and for acquiring by purchase, lease or otherwise, such works, and operating and dealing in the stock and bonds of other corporations and associations organized for a similar purpose, both in said State of Illinois and elsewhere, and for other purposes.

III. On or about the 1st day of July, 1887, the Mortgagor Company, being thereunto by law duly authorized, to secure the payment of the bonds hereinafter mentioned, executed, acknowledged and delivered to your orator, The Farmers' Loan and Trust Company, as Trustee, its certain mortgage or deed of trust, therein and thereby conveying and transferring to your orator, and to its successors or successor and assigns, all the following property and premises by the following description, to-wit:

"All its privileges, franchises, easements, choses in action, estate, property, real and personal, effects and assets, which the American Water Works Company had on July 1, 1887, or may at any time thereafter during the existence of said mortgage acquire in the County of Douglas, in the State of Nebraska, in and about its works, plant and property, used for the purpose of supplying the City of Omaha, its inhabitants and others in said County of Douglas with water for all purposes, whether or not the same be mentioned herein, among which are the following, that is to say, all and singular, the following described property, situate, lying and being in the County of Douglas, in the State of Nebraska, known, described and designated as follows, to-wit:

All those tracts or parcels of land situate in the City of Omaha, County of Douglas, State of Nebraska, known and described as follows:

1st. Beginning at the intersection of Lowe Avenue and the north line of Nicholas Street, thence north two hundred and ninety-eight (298) feet, thence east six hundred and four feet (604) thence south two hundred and ninety-eight (298) feet to Nicholas Street, thence west six hundred and four (604) feet to the place of beginning.

2nd. Beginning at a point where the west line of Pleasant Street intersects the south line of Hamilton Street, thence westerly four hundred and thirty-three (433) feet, thence south seven hundred and four and eight-tenths (704 8-10) feet, to the north line of Nicholas Street, thence east four hundred and thirty-three (433) feet to pleasant Street, thence north seven hundred and twenty-five (725) feet to the place of beginning.

3rd. Beginning at the intersection of the east line of Lowe 299 Avenue with the south line of Hamilton Street, thence easterly on the south line of Hamilton Street six hundred and

four (604) feet, thence south four hundred and six and eight-tenths (406 8-10) feet, thence west parallel with the half section line six hundred and four (604) feet to the east line of Lowe Avenue, thence north on the east line of Lowe Avenue four hundred and three tenths (400 3-10) feet to the place of beginning.

4th. Lots One (1), two (2), three (3), four (4), five (5), six (6), seven (7) and eight (8) in Block Q, of the City of Omaha according to the recorded plat thereof.

5th. Lots one (1), two (2), five (5) and six (6) in block three hundred and twenty-eight (328) in the City of Omaha, according to the recorded plat thereof.

And also all rentals, debts, dues, demands, choses in action of every kind and nature, including water rents from the said City of Omaha under and by virtue of a contract made between the said City of Omaha and one Sidney E. Locke and afterwards assigned by the said Locke to the said City Water Works Company of Omaha and by the said first named corporation assigned to The American Water Works Company; and under and by virtue of any contract now existing or which may hereafter exist between the said City of Omaha and the American Water Works Company or its assigns, or which enures to the benefit of the said The American Water Works Company and its assigns by assignment or otherwise, and all water rents from private consumers wheresoever situate and all other income of any kind whatsoever from any property or person in said County of Douglas, in the State of Nebraska.

IV. In and by virtue of said mortgage or deed of trust it was provided that said instrument should work and should be an absolute assignment of said debts, dues, demands, choses in action and water rentals, both those existing on July 1, 1887, or which might at any time thereafter exist, or be derived in said County of Douglas, and of the property of the said The American Water Works Company in the said County of Douglas, to your orator as Trustee, to the extent, and for the uses and purposes in said instrument mentioned.

V. Your orator further shows that thereafter, and on or about the 16th day of January, 1889, the said Mortgagor Company, in accordance with a provision contained in said mortgage or deed of trust, being thereunto by law duly authorized, duly made, executed and delivered to your orator a further and supplemental mortgage or deed of trust to secure the payment of the said bonds hereinafter mentioned, therein and thereby conveying and transferring to your orator, and to its successor or successors and assigns, all the following property and premises by the following description, to-wit:

All the privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, in the said County of Douglas and State of Nebraska, which were conveyed by said mortgage or deed of trust, and also all the privileges, franchises, easements, choses in action, estate, property real and personal, effects and assets, which the said The American Water Works Company has acquired since the making of said mortgage or deed of trust in the said County of Douglas and State of Nebraska, or which it now

has in said County of Douglas and State of Nebraska, whether or not the same be mentioned herein, among which are the following, that is to say: All and singular the following described property situate, lying and being in the City of Florence, County of Douglas, and State of Nebraska, known, described and designated as follows: Beginning at a point eighty-five (85) feet south of the northwest corner of Block one hundred and twenty-seven (127) of the City of Florence as surveyed, platted and recorded, and running south seven hundred and ninety-five (795) feet to the right of way of the St. Paul, Minneapolis & Omaha Railroad, thence in a southerly and easterly direction along such right of way (a three degree curve) to a point one thousand eight hundred and sixty-seven (1867) feet (end of curve); thence south two hundred and sixty-three (263) feet; thence east one hundred and five (105) feet; thence south two thousand three hundred and sixty-five (2365) feet to the right of way of the aforesaid St. Paul, Minneapolis & Omaha Railroad; thence in a southeasterly direction along said right of way seventy (70) feet; thence east nine hundred and thirty-five (935) feet to the southwest corner of Block number two hundred and sixty-three of the City of Florence, as surveyed, platted and recorded; thence north one thousand three hundred (1300) feet; thence east six hundred and sixty (660) feet; thence north one hundred and ninety-five (195) feet (more or less) to the west bank of the Missouri River; thence in a northeasterly and northerly direction along the bank of said river, until intersecting with the east and west line through the northwest corner of Block number one hundred and twenty-seven (127) (said line being the same as the north line of said Block and the south line of Bridge Street) of the City of Florence as surveyed, platted and recorded; thence west five hundred and ninety-five (595) feet (more or less), and thence in a southwesterly direction one hundred and seventy-five (175) feet to the point of beginning, containing one hundred and twenty-five (125) acres of land (more or less).

301 Also Lots one (1) two (2) four (4) five (5) and eight (8) Block No. 2, and the whole of Block number two hundred and sixty (260) all in the City of Florence, as surveyed, platted and recorded.

And also all the water works, mains, pipes, machinery, standpipe, chattels real, real estate, effects, choses in action, and assets of the said The American Water Works Company in the City of South Omaha, in said County of Douglas, and State of Nebraska, including all water rentals, debts, dues and demands, and choses in action of every kind and nature, both water rentals from the said City of South Omaha in and by virtue of the contract by and between the said City of South Omaha and the said The American Water Works Company, and in and by virtue of a contract existing January 16, 1889, or which might thereafter exist between the said City of South Omaha and The American Water Works Company or its assigns, which enures or might enure to the benefit of the said The American Water Works Company and its assigns, and all water rents from private consumers wheresoever situate, and all other income of whatever kind from any

property of said Company or source whatsoever, in said County of Douglas, and State of Nebraska.

VI. It was provided in said supplemental mortgage that said instrument should further work and be an absolute assignment of said debts, dues, demands, choses in action and water rentals both those existing January 16, 1889, or which might at any time thereafter exist or be derived in said County of Douglas, and of the property of the said The American Water Works Company in the said County of Douglas, to your orator, as Trustee, to and for the uses and purposes in said instrument mentioned.

VII. The said mortgage and supplemental mortgage were made by said defendant, the Mortgagor Company, to secure an issue of bonds which the said defendant, the Mortgagor Company, being thereunto by law duly authorized, did, on or about the first day of July, 1887, execute and issue, dated that day, and for the sums respectively of one thousand dollars, aggregating the sum of Four Millions of Dollars of principal, payable on the first day of July, 1907, and bearing interest at the rate of six per cent per annum, payable semi-annually on the first days of January and July in each and every year at the office of your orator in the City of New York, said interest payments being further evidenced by the Coupons attached to said bonds. Upon each of said bonds there was a certificate

made by your orator stating that said bond was one of a series
302 amounting to Four Millions of Dollars issued in accordance with the trust mortgage referred to in said bond, and was entitled to the benefit thereof; said mortgage being the mortgage hereinbefore mentioned and described—all of which by the said bonds and each of them, and the said certificates thereon, to which your orator, for greater certainty, refers, will more fully and at large appear.

VIII. In and by said mortgage of July 1, 1887, it was provided that the right was reserved to the Mortgagor Company at any time on or before the issue and delivery by your orator of any of said bonds, numbered from two thousand and one to four thousand, both inclusive, to reduce the rate of interest thereon to five per cent. per annum, payable semi-annually, and in that case the said Mortgagor Company, should certify under its seal and the signature of its President and Secretary to your orator its determination to reduce the rate of interest on any of said bonds, and your orator should thereupon cause to be endorsed or stamped upon the face of each of said bonds upon which it had been determined to reduce the rate of interest the words "Interest upon this bond reduced to and fixed at five per cent per annum before issue", and upon the face of each coupon the words "Reduced to Twenty-five Dollars". In each of said bonds the said Mortgagor Company reserved the right, when the said Two Millions of Dollars of bonds were issued, to reduce the rate of interest thereon, or any part thereof, to five per cent per annum. And thereafter the said Mortgagor Company duly determined to reduce the rate of interest on the bonds secured by said mortgage, and numbered consecutively from two thousand and one to four thousand, both inclusive, to five per cent per annum, and thereafter said deter-

mination was duly certified to your orator, and there was caused to be endorsed and stamped upon the face of each of said two thousand bonds, numbered from two thousand and one to four thousand, both inclusive, the words "Interest upon this bond reduced to and fixed at five per cent per annum before issue", and upon the face of each coupon the words "Reduced to Twenty-five Dollars."

IX. In and by said supplemental mortgage of January 16, 1889, the said Mortgagor Company further promised and agreed that said instrument was given for the purpose of securing the payment, according to the provisions in the said mortgage or deed of trust contained, of the principal and interest of all of the four thousand bonds therein mentioned as the same severally and respectively thereafter became due and according to the rate at which the same should thereafter bear interest; in gold coin of the United States of the present standard of fineness.

303 X. Said mortgage or deed of trust and said supplemental mortgage conveyed the property, premises, franchises and rights hereinbefore described to your orator, to have and to hold the said rights, privileges, easements, choses in action, property real and personal, estate, effects and assets in trust for the purpose of securing the payment:

(A) Of the interest on such of said bonds as should be at any time during the lien of said mortgages outstanding or negotiated;

(B) The principal of such of said four thousand bonds as should be outstanding and negotiated at any time during the continuance of said mortgages, according to the provisions and agreements contained in said coupons and bonds respectively, pro rata, and without preference or priority between different bonds (it being understood that the lien of said mortgages was to secure the payment of all interest on any of said bonds in full prior to the payment of any principal) the payments to be made said bondholders by said Trustee or by any receiver or officer acting as Master in Chancery, or in case of foreclosure, however the money should come to said Trustee, Master or Receiver, should be made pro rata, first to pay said interest, and second said principal, without preference or priority between bonds, and each of said bonds which might be at any time outstanding and negotiated should be deemed to be equally secured by said mortgages and all conveyances or mortgages supplementary thereto.

XI. In and by said mortgage or deed or trust it was provided that should the said Mortgagor Company at any time make default in the payment of the interest on said bonds, or any installment or part of any installment thereof, at the time, in the manner, or at the place when and where said interest, or any installment or part thereof, should be due and payable according to the terms of said bonds and coupons, or should said Mortgagor Company make any default, or neglect or refuse, or in any manner fail to observe, do, keep and perform, all and singular, each and every covenant, promise, agreement, and stipulation in said bonds and coupons, and said mortgage contained and by it, said Mortgagor Company, to be observed, done, kept and performed, then your orator might at its option, in case such default, neglect, refusal or failure, should extend for the

period of ninety days, declare the whole sum, principal and accrued interest evidenced by said bonds and coupons then outstanding and negotiated, to be then immediately due and payable and in default.

XII. In and by said mortgage or deed of trust it was further provided, that in case of any default in the payment of the principal sum evidenced by said bonds according to the provisions and agreements of said bonds and coupons, and in case of any default, neglect, refusal or failure to observe, keep and perform all and singular each and every covenant, agreement, provision and stipulation in said bonds and coupons and said mortgage contained, and by said Mortgagor Company to be observed, kept and performed, all the rights of said Mortgagor Company to retain in its possession all said mortgaged rights, privileges, franchises, easements, choses in action, estates, property real and personal, effects and assets, should immediately cease and therefrom the right of possession of the same should immediately vest in your orator, and your orator might at once enter into possession thereof, and the said Mortgagor Company, and each and every occupant to be moved and put out, and may have, receive, sue for, collect and receipt for in its own name, or that of the Mortgagor Company, or any assignee of said Mortgagor Company, all and singular the water rentals and prices due and to become due from the City of Omaha, or from private consumers, or others on account of water supplied for fire, domestic or other purposes, and all and singular the income of the Mortgagor Company from whatever source derived, receive and have all debts, dues and demands of whatever nature or kind, receive, receipt for, have and appropriate to the purposes of the trust created by said instrument, and might during said time, as to it might seem fit and best, with or without foreclosing said mortgage, continue in possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estates, property real and personal effects and assets, and operate and carry on the works and business of said Mortgagor Company, and carry out and perform the contracts of the Mortgagor Company with its customers for the supply of water, including the City of Omaha, and make new contracts for the supplying of water, and by means of the works, machinery, mains, pipes and valves of the Mortgagor Company supply water, and do all and singular the acts and things which the said Mortgagor Company could do in the premises if it had remained in the possession of the same.

XIII. In and by said mortgage or deed of trust it was further provided, that in case of any default as aforesaid in the payment of interest or principal upon said bonds or coupons according to the terms and provisions thereof which should continue for ninety days, or in case of any default, neglect, refusal, or failure to observe, do, keep and perform all and singular the covenants, conditions, promises agreements and stipulations in said bonds and coupons or in said mortgage contained, it should and might be lawful for your orator to foreclose said mortgage and forever bar the Mortgagor Company of all equity of redemption therein, and in case of such foreclosure, or any proceeding therefor, your orator

might at the commencement of the suit, and before any plea, answer or demurrer was filed, apply for the appointment of a receiver of all the rents and profits, debts, dues, demands and choses in action, and the property, estate and assets of the Mortgagor Company thereby mortgaged or conveyed, or intended so to be, or which it should then possess or be entitled to, or interested in, and such receiver should be appointed without any opposition from the Mortgagor Company, and such receiver should be vested with all the rights and privileges, and subject to all the duties and obligations granted to and obligatory upon your orator in case of entry into possession and as specified in the preceding paragraph of this bill of complaint; and in case of any foreclosure of said mortgage the whole sum of the indebtedness evidenced by said bonds and coupons, both principal and interest, should be deemed to be due and payable, and such foreclosure should be to satisfy such whole sum.

XIV. In and by said mortgage or deed of trust it was further provided, that in no event should any expense of any kind fall upon your orator, but all its expenses and costs, including the fees and charges of attorneys and agents employed by it in good faith in the administration of the trusts in said mortgage contained, should be paid by the said Mortgagor Company; and in case of any entry and taking possession by your orator, or in case of any foreclosure proceedings, or in case of the appointment of any receiver, or in case of the receipt of any moneys by your orator or any receiver or officer of court from any income, debts, dues or demands collected or received by it, him or them from any sale of the goods, or any of them, therein mortgaged or conveyed, or intended so to be, or thereafter conveyed by any assignment, conveyance or supplementary mortgage, the costs and expenses of all kinds of the said Trustee in the administration of the trust, of foreclosure and sale, of courts, officers and receivers, should be first paid out of said moneys and the surplus, if any, should be devoted to paying the whole indebtedness secured thereby, interest and principal, pursuant to the terms of the first above clause until the whole thereof is paid, and if there should remain any surplus the same should be paid over to the Mortgagor Company. It was further provided that the Trustee should be entitled to be reimbursed all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation for any duties that it might at any time perform in the discharge of the same, and all such fees, commissions, compensations and disbursements should constitute a lien on the mortgaged property and premises.

XV. In and by said mortgage or deed of trust it is further provided, that no delay or omission of your orator, or of the holders of the bonds secured thereby, in respect to any default happening or continuing as aforesaid, to exercise the rights and powers arising therefrom as in said mortgage provided, should be held to exhaust or impair such rights and powers, or be construed to be a waiver of said defaults.

XVI. In and by said mortgage or deed of trust it was further provided, that on any sale, whether by your orator or the court, of the

property thereby conveyed, or any part thereof, your orator should have the right to buy in the same, and a majority in amount of the holders of the outstanding bonds should have the right, by a written instrument under the hands and seals of such majority, to fix a sum which it shall be the duty of your orator to bid for the property so sold on behalf of and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of your orator, or a court, as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of said mortgage, and of the proportion of said sum payable to the bondholders not concurring in such request. On any purchase your orator should hold the property so purchased upon trust for the equal benefit of the bondholders who had required your orator to buy in the property in their behalf as the absolute property of said bondholders, without any right of redemption or resale, in favor of said Mortgagor Company or any bondholder.

XVII. In and by said mortgage or deed of trust said Mortgagor Company covenanted, granted, bargained and agreed to and with your orator that it would at any time in the future, upon demand, at its own expense, execute, deliver and record all such further and other conveyances, assignments and supplementary mortgages of the rights, privileges, easements, estate, choses in action, property real and personal, effects and assets then owned by it, whether covered by said conveyance or not, situate in the said County of Douglas in the State of Nebraska, and of any right, privilege, easement, chose in action, property real and personal, effects and assets, which it might at any time thereafter acquire in said County of Douglas and State of Nebraska, and in any wise connected with the said mortgaged property as your orator might demand to subject the

307 same to the lien of said mortgage and such further and other conveyances, assignments and supplementary mortgages, should be deemed a part of this instrument, and form together *on* security for the payment of the debt evidenced by said bonds and coupons; and in accordance with said covenant the said Mortgagor Company executed and delivered the supplementary mortgage of January 16, 1889, hereinbefore mentioned, and in and by said supplementary mortgage provided that said supplementary mortgage, together with said original mortgage or deed of trust, should be deemed one instrument, and that all the provisions in said mortgage or deed of trust contained for the possession by the Mortgagor Company previous to any default for defeasance, and all the conditions, agreements and covenants in said mortgage contained, were recited and made part of said supplementary mortgage, and all the provisions in said mortgage or deed of trust contained for the protection of your orator and the limitation of its liabilities were made a part of said supplementary mortgage as if therein again specially written. And the said Mortgagor Company in said supplementary mortgage further covenanted to make such further and other conveyances, assignments and supplementary mortgages as it had already covenanted in said original mortgage or deed of trust.

XVIII. The said mortgage of July 1, 1887, and the said supple-

mentary mortgage of January 16, 1889, were and are the proper acts and deed of the Mortgagor Company, by it authorized, made and delivered in all respects in conformity with law; and the said first mentioned mortgage was duly recorded in the office of the County Clerk of Douglas County on the 18th day of July, 1887, in Book 67, of Mortgages, page 598, and the second mentioned mortgage was duly recorded in the office of the Register of Deeds for the County of Douglas on the 27th day of March, 1889, in Book 115 of Mortgages, page 75, and the same are valid conveyances for the purposes therein stated. The trusts therein and thereby created were duly accepted by your orator before the recording of the said mortgages or deeds of trust respectively as aforesaid. Your orator attaches to this its bill of complaint, as Exhibits "A" and "B", copies of said mortgages, and referring thereto prays that the same may be taken as a part hereof.

XIX. The said Mortgagor Company duly made, executed and delivered to your orator the entire issue of Four Thousand bonds under said mortgage or deed of trust, and under and by virtue of the provisions of said mortgage or deed of trust your orator, being 308 thereunto duly requested, certified in the form set forth therein, and delivered upon the orders of said Mortgagor Company, three thousand, six hundred of the bonds mentioned and described in the said mortgage or deed of trust and to secure which the same was executed, and delivered as aforesaid, and a large number of said bonds, aggregating a very large sum of money are outstanding and existing obligations on the part of the Mortgagor Company, and the remaining four hundred bonds, numbered from sixteen hundred and one to two thousand, both inclusive, are deposited with your orator under the provisions of said mortgage for the purpose of exchanging, redeeming or purchasing four hundred thousand dollars of bonds issued by the City Water Works Company of Omaha, which are secured by a mortgage covering a portion of the premises hereinbefore described. The holders and owners of a large number of said bonds, and of a large number of the unpaid coupons, secured by said mortgage have requested, in writing, your orator to commence this suit and to foreclose the said mortgages or deeds of trust. The holders of the bonds secured by the said mortgages or deeds of trust are numerous and the names and residences of many of such holders are unknown to your orator, and your orator cannot allege with greater certainty the number of bonds outstanding constituting valid claims against the defendant the Mortgagor Company, or the amount of the indebtedness existing by virtue of the same.

XX. Default was made by the Mortgagor Company in the payment on the first day of January, 1892, of the coupon interest due on that day on all the said bonds which were issued and outstanding as aforesaid, and all the interest on all of said bonds due on that day remains overdue and unpaid, except that since said default thirty-five of the six per cent coupons, and one hundred and twenty-nine of the five per cent coupons due on said first day of January, 1892, have been paid. Default was also made by the Mortgagor Company in the payment on the first day of July, 1892 of the coupon interest due on that day on all the said bonds, except eight hundred and

eighty-five of the six per cent coupons and nine hundred and thirty-eight of the five per cent coupons, due on that day, have been paid. And default has also been made by the Mortgagor Company in the payment on the first day of January 1893, of the coupon interest due on that day on all of the said bonds, except that twelve hundred and thirty-four of the six per cent coupons, and fifteen hundred and thirty-six of the five per cent coupons were paid. All the remaining interest due on said several days on the said bonds remains overdue

and unpaid. And default has also been made by the Mortgagor Company in the payment on the first day of July, 1893, of the coupon interest due on that day on all of the said bonds.

Demand has also been duly made of the Mortgagor Company for the payment of some of the said interest on some of the said bonds which fell due on each of the dates aforesaid, and payment of the same has been refused. The default in non-payment of the coupon interest due on the first days of January and July, 1892, and the coupon interest due on the first day of January, 1893, has extended for more than ninety days, and your orator now declares the whole sum of the principal and accrued interest evidenced by said bonds and coupons now outstanding and unpaid to be immediately due and payable and in default.

XXa. Your orator further shows that after the execution and delivery of said mortgages or deeds of trust to your orator the said Mortgagor Company on or about the 28th day of April, 1891, made, executed and delivered to the defendant, The American Water Works Company, the New Jersey corporation, a deed whereby it purported to convey to said New Jersey corporation all its works, property, franchises, easements, choses in action of every kind, character and nature whatsoever, and that said New Jersey corporation at present claims to be the owner of the said property and premises described in said mortgages or deeds of trust, but your orator is advised, and therefore alleges, that the rights of the said New Jersey corporation in and to said property and premises are in all respects inferior to and subject to the lien of the mortgages made to your orator as aforesaid.

XXb. Your orator further shows that in a suit brought in the Circuit Court of the United States for the District of Nebraska, by the Denver City Water Works Company and others, complainants against The American Water Works Company (the New Jersey corporation) and others, defendants, on the 11th day of February, 1892, an order dated that day was duly made appointing Ellis L. Bierbower and Alonzo B. Hunt, Receivers of all the property and assets, real and personal, of every kind and description of the said The American Water Works Company, the New Jersey corporation, which might be situated in the District of Nebraska, including the property, premises and franchises covered by the said mortgages to your orator and said Receivers thereupon entered into possession of the property of which they were so appointed receivers. And thereafter, and in or about the month of July 1892, in a suit brought in the Court of Chancery, a court of competent jurisdiction in the State of New Jersey, by certain creditors of The American Water Works Company,

the New Jersey corporation, to have the same declared insol-
310 vent and for a distribution of its funds among the creditors
under the statute, in which action the Denver City Water
Works Company and others were complainants and The American
Water Works Company (the New Jersey corporation) and others
were defendants, the defendant E. Hyde Rust was appointed by the
said Court of Chancery receiver of all the property and franchises of
the said New Jersey corporation; and thereafter the said Rust was,
by order of the Circuit Court of the United States for the District of
Nebraska, duly substituted in the place and stead of said Bierbower
and Hunt as receiver in the action brought in said Circuit Court of
the United States, and said defendant Rust as such Receiver is now
in possession of the property, premises and franchises covered by the
said mortgages made to your orator as aforesaid; but your orator
alleges that whatever rights the said Rust as such receiver may have
are inferior to and subject to the lien of the said mortgages made to
your orator.

XXc. Your orator further shows that under the law of the State
of New Jersey concerning corporations approved April 7, 1875, and
as subsequently amended, the Chancellor of said State, in an
action brought by any creditor or stockholder setting forth the facts
and circumstances of the case showing that a corporation is insolvent,
has power to proceed in a summary way to hear the affidavits, proofs
and allegations which may be offered by or on behalf of the parties,
and if upon such inquiry into the matters or causes of the complaint
it shall be made to appear to the Chancellor that the said company
has become insolvent and shall not be about to resume its business in
a short time thereafter with safety to the public and advantage to the
stockholders, it shall and may be lawful for the Chancellor to issue an
injunction to restrain the said company and its officers and agents
from exercising any of the privileges or franchises granted by its cer-
tificate, or by the act incorporating the said company, and from col-
lecting and receiving any debts, or from paying out, selling, assign-
ing or transferring any of the estate, moneys, funds, lands, tenements
or effects of the said company until the court shall otherwise order;
and it shall and may be lawful for the Court of Chancery, if the cir-
cumstances of the case and the end of justice require it at the time
of ordering the said injunction, to appoint a receiver or receivers with
full power and authority to demand, sue for, collect, receive and take
into their possession all the goods, chattels, rights and credits moneys
and effects, lands and tenements, books, papers, choses in action, bills,
notes and property of every description belonging to the said com-

pany at the time of their insolvency or suspension of business,
311 and to sell, convey or assign all of the said real or personal
estate, and with the other powers in said statute enumerated,
and it has been held by the courts of said State of New Jersey, and
your orator alleges that it is the law of said State, that upon such
appointment of a receiver its title to its property is divested by force
of law and becomes vested in the receiver.

XXd. Your orator further shows that the said suit of the Denver
City Water Works Company and others, brought in the Court of

Chancery, State of New Jersey, and hereinbefore referred to, was brought under said statute of the State of New Jersey, and that by the order entered in such action and dated the 20th day of July, 1892, the said E. Hyde Rust was by said Court of Chancery appointed receiver of the said The American Water Works Company (the New Jersey corporation) with full power to demand, sue for, collect and receive and take possession of the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to the said The American Water Works Company, and to perform all the duties imposed upon him and required by law, and especially by said act entitled "An Act concerning Corporations," approved April 7, 1875, and the acts supplemental thereto and amendatory thereof; and said order also contained an injunction restraining the said company, and its officers and agents, from exercising any of the privileges or franchises granted by its certificate, and from collecting or receiving any of the debts, and from paying out, selling, assigning or transfer-ing any of the estate, moneys, funds, lands, tenements or effects of the said Company, and your orator is advised, and therefore alleges that by virtue of said order the said The American Water Works Company was divested of its title to all its property, both real, personal and mixed, and that the said title became vested in the said receiver so appointed.

XXe. Your orator further shows that before the filing of this bill by orders of the Court of Chancery of the State of New Jersey, and of the Circuit Court of the United States for the District of Nebraska, duly made and entered, your orator was authorized to make the said E. Hyde Rust, as receiver, a defendant to this its suit to foreclose said mortgages.

Your orator further shows that on the — day of —, 1893, the said E. Hyde Rust was by the consideration of the Circuit Court of the United States for the District of Nebraska suspended as Receiver of said American Water Works Company and the said Alonzo B. Hunt was by the consideration of said Court duly appointed temporary Receiver of said American Water Works Com-
312 pany. And your orator avers and says that by reason of such order and proceedings the said Alonzo B. Hunt is a proper and necessary party to this suit, being thereby invested with the duties and powers of a Receiver for said Company and with the title of said property and the control of the same.

And your orator further shows to this Court that upon due application made to his Honor Elmer S. Dundy, Judge, an order was duly made by the consideration of the said Circuit Court of the United States for the District of Nebraska before the filing of this bill authorizing your orator to sue the said Alonzo B. Hunt, Receiver.

XXI. Your orator is informed and believes that the Mortgagor Company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by the said mortgages or deeds of trust so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the

amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trust, namely, the holders of the bonds secured by the said mortgages or deeds of trust so made to your orator as aforesaid.

XXII. By reason of the matters and things hereinbefore alleged there is due to your orator, as trustee under the aforesaid mortgages or deeds of trust, the amount of the principal sum secured by each and every of the said bonds that have been issued, together with the coupon interest which fell due on the first day of January 1892, and on the first day of July, 1892, and on the first day of January, 1893, and on the first day of July, 1893, and which remains unpaid as aforesaid, with interest on each installment of the said coupon interest from the time when the same fell due as aforesaid.

No proceedings have been had, at law or in equity, for the collection of said mortgage debt, or any part thereof, save only this suit.

XXIII. In consequence of the embarrassed condition of the financial affairs of the Mortgagor Company, and on account of the many difficulties which are manifest upon and from the allegations hereinbefore contained, involved in the execution of your orator's said trust, it is impossible for your orator, as trustee under the said mortgages or deeds of trust, to execute its said trust in the way and manner specified and provided in and by the said mortgages or deeds

of trust, without the aid or interposition of this Honorable
313 Court in Chancery sitting; nor can the said trust be executed, as your orator is advised and charges, and the rights of all the parties interested be ascertained and fully protected in the premises otherwise than by a judicial sale of the mortgaged premises and of all the franchises, property, premises and appurtenances covered by the said mortgages or deeds of trust. Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises and property of the Mortgagor Company, of whatever name, nature and description, including all its money on hand and the earnings of the same, be placed in the hands and under the control of a receiver, to be appointed herein by this Court, with such proper powers and control over the same as to the Court shall seem right and equitable to be conferred.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a Court of Equity, where matters of this nature are properly cognizable and relievable; to the end therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all matters and charges aforesaid, and that as fully in every respect as if the same

were here again repeated and they thereunto particularly interogated; that your orator be placed in possession of the mortgaged premises personally, or that a receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature of the said defendants The American Water Works Company (of Illinois) and of the American Water Works Company (of New Jersey) covered by the lien of said mortgagee, with power and authority to operate said water works and other property and carry on the business of said Mortgagor Company under the protection of this Court, with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to the said Mortgagor Company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever; that an injunction may issue out of this Court, restraining and enjoining the said Mortgagor Company and all and every its agents and servants, from in any way interfering with the possession or control of the property of said Mortgagor

314 Company under the control of said receiver, and from selling, transferring, conveying, leasing, or otherwise disposing of or incumbering any of the property, rights or franchises of the said Mortgagor Company; that all the rights and franchises, and all the property, real and personal, of the said Mortgagor Company may be declared subject to the lien of the said mortgage or deed of trust; that an account may be taken of the amounts due upon the bonds secured by the said mortgage or deed of trust, and now outstanding, with interest thereon; that the amount so found due may be found to be the first lien on the property of the said Mortgagor Company, according to the terms of the said mortgage or deed of trust; that the said Mortgagor Company may be decreed to pay the amount so found to be due upon said bonds and the coupons thereto, for interest or principal or both; that in default thereof, all the property and franchises of the said Mortgagor Company may be sold under a decree of this Court and according to the law and practice of this Court, to satisfy the amount so found due; that out of the proceeds of said sale, or the net earnings while in the hands of said receiver so to be appointed, there may be paid, first, the costs and expenses of your orator in this suit, including proper attorneys', solicitors and counsel fees, with a proper compensation to your orator for its own services as trustee, to be allowed by the Court, and that the residue thereof may be applied to the payment of the amount due upon the said mortgage bonds, and the coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such a way as this Court may direct; that all the defendants in this suit may be barred of and from any equity of redemption of and in the said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the said Mortgagor Company; and that your orator may have such other and further relief in the premises as the circumstances of the case may require and as may be agreeable to equity.

May it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court

directed to the defendants, The American Water Works Company (of Illinois), The American Water Works Company (of New Jersey) and E. Hyde Rust as Receiver of The American Water Works Company (of New Jersey) to appear and answer this bill. And your orator will ever pray, etc.

THE FARMERS' LOAN & TRUST
COMPANY,
R. G. ROLSTON, *President.*

[SEAL.]

315 Attest:
E. S. MARSTON, *Secretary.*

TURNER, McCLURE & ROLSTON,
C. H. LAMAR,
Solicitors for Complainant.
HERBERT B. TURNER,
Of Counsel.

STATE OF NEW YORK,
Southern District of New York, ss:

I, Rosewell G. Rolston, being duly sworn, depose and say, that I am President of the Farmers' Loan and Trust Company, the complainant above named, and have been such President for a number of years past; that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true. That this verification is not made by the complainant because it is a corporation; and that my knowledge is derived from having taken part in the transaction spoken of and from statements made to me, and from examination of the papers, and the same constitute my grounds of belief. The seal affixed to said bill of complaint is the corporate seal of said complaint, and was so affixed by its authority.

R. G. ROLSTON.

Sworn to before me this 1st day of September, 1893.

[SEAL.]

W. B. CARDOZO,
Notary Public, No. 145, New York County.

EXHIBIT A.

This Indenture, made and entered into the first day of July, A. D. 1887, by and between The American Water Works Company, a corporation organized under the laws of the State of Illinois and having its principal office at the City of Chicago, party of the first part and The Farmers' Loan and Trust Company of the City, County and State of New York, a corporation organized under the laws of the State of New York, having its principal office at the City of New York, as trustee, party of the second part:

Witnesseth, that whereas The American Water Works Company is a corporation organized under the laws of the State of Illinois,

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having its principal office and place of business in the City of Chicago, Cook County, in the State of Illinois;

316 And Whereas, The said The American Water Works Company is authorized to build, equip and operate works to supply water to cities, towns, villages and municipal and other corporations, to acquire by purchase, lease or otherwise such works, and operate and deal in the stock — the bonds of other corporations and associations organized for a similar purpose, both in the said State of Illinois and elsewhere.

And Whereas, the said The American Water Works Company has purchased of and from the City Water Works Company, of Omaha, Nebraska, a corporation, organized under the laws of the State of Nebraska, its water works, including the real estate connected and used with the same by means of which, the said city of Omaha and its inhabitants are supplied with water for fire and other purposes, including the contract under which the said City Water Works Company of Omaha, furnishes and supplies water to said City of Omaha, and all contracts with private consumers, which said property is more fully hereinafter described.

And Whereas, the said The American Water Works Company has agreed to assume the bonded debt of the said City Water Works Company, and pay the same and to assume and pay all the other indebtedness of the said City Water Works Company, as a part of the consideration to be paid to the said City Water Works Company by said The American Water Works Company, and in addition thereto, a large sum of money in cash.

And Whereas, the said City Water Works Company had determined previous to said purchase, to make certain large and extensive improvements, additions and enlargements of its work and plant, for the purpose of enabling it to comply with the increased demand upon it arising from the rapid growth of the City of Omaha, and has commenced the same; which improvements, additions and enlargements the said American Water Works Company deems also essential and necessary to the successful maintenance and operation of said water works, and to comply with the contract with the said City of Omaha.

And Whereas, the said The American Water Works Company is authorized by law to contract debts and borrow money without limit;

And Whereas, the power of contracting debts and of borrowing money by the said The American Water Works Company is vested in the Board of Directors hereof, and the said Board of Directors is authorized, so as aforesaid, to borrow money and contract debts in its name, and make, issue and deliver its obligations therefor
317 and secure the same by mortgage on its property, and pledge its income and resources for the payment thereof, and as security therefor;

And Whereas, heretofore, on the thirtieth day of June, 1887, the board of directors of said The American Water Works Company, at a meeting duly held at the office of the company in the City of Chicago, Illinois, unanimously adopted the following resolutions:

Whereas, this company has purchased from the City Water

Works Company of Omaha, Nebraska, a corporation organized under the laws of the State of Nebraska, all its plant and property and all its interest under the contract between said Company and the City of Omaha, by which the said City of Omaha as a municipality, is supplied with water.

And whereas, such purchase was made subject to four hundred thousand dollars (\$400,000) of six per cent bonds secured by a mortgage of the property of said City Water Works Company, which said bonds and said mortgage bear date on the second day of August, 1905, with the option to pay the same on the second day of August, 1900.

And Whereas, said purchase was also made subject to the payment of the outstanding debts, dues and demands owing by said City Water Works Company of Omaha, which amount to the sum of one hundred and sixty thousand dollars (\$160,000);

And Whereas, this company is indebted for the purchase price of said property of the said City Water Works Company in a large sum of money in addition to the assumption of said debts:

And Whereas, in order to comply with the requirements of the contract with the said City of Omaha and to provide suitable means and facilities of furnishing water to said City of Omaha and its inhabitants, of suitable quality and in suitable quantities, it is necessary to expend in the purchase of land and in building and erecting a new plant and in building new and additional pumping machinery of large capacity; in laying new mains throughout the City; in reinforcing the present system of mains by additional ones of larger size and connecting the systems of mains in the City with the new plant by a double line of thirty-six (36) inch pipe for a distance of about six miles; the building of settling basins; the finishing and completion of the separate high service system and other extensions and improvements to the said plant, a large sum of money estimated at not less than eight hundred thousand dollars (\$800,000)
318 all of which erections, additions, extensions, enlargements and improvements must be completed within the next eighteen months;

And Whereas, for the purpose of securing the payment of said bonded debt and the payment of the said other debts of said City Water Works Company, assumed by this company, and the payment to the said City Water Works Company of the said purchase price of said property and the payment for the making of such improvements, additions, extensions and enlargements so determined upon will require the sum of \$2,500,000.

And Whereas, in view of the rapid growth of the said City of Omaha, both past and prospective, this Company deems it necessary to provide means sufficient in amount to make further extensions, enlargements, improvements and additions of its works as the same become necessary, without resorting to a new issue of bonds.

And Whereas, for the purpose of such further enlargements, extensions and improvements, the directors, of this company, have determined that one million, five hundred thousand dollars (\$1,500,000) more of bonds in addition to the two million five hundred thousand dollars (\$2,500,000) aforesaid should be provided for, to

be issued under proper restrictions, for the purpose of making such enlargements, improvements and extensions, as may be necessary in the future;

And Whereas, it may be impossible at the present time to take up and pay off and redeem all said bonds so issued by said City Water Works Company.

Therefore Resolved, that this Company make, issue and deliver its four million dollars (\$4,000,000) of negotiable bonds, being four thousand (4,000) bonds of one thousand — (\$1,000) each numbered consecutively from number one (1) to number four thousand (4,000) both inclusive, bearing date July 1st, 1887, to become due and payable July 1st, 1917, with interest at six per cent per annum payable semi-annually according to forty coupons to be annexed to each of said bonds.

Resolved, that said bonds shall be in such form and of such tenor and effect as to the President and Secretary of this Company shall seem best; provided, the same shall be in accordance with the terms of these resolutions but may contain such other covenants, agreements, conditions and stipulations as are not in contravention of any thing in these resolutions expressly contained.

Resolved that the Farmers' Loan and Trust Company
319 of New York be appointed trustee under all the trusts in connection with the said bonds and the mortgage securing the same.

Resolved, that four hundred (400) of said bonds of one thousand (\$1000) dollars each numbered from number sixteen hundred and one (1601) to number two thousand (2000) both inclusive, be deposited with The Farmers' Loan and Trust Company of New York, as trustee, for the purpose of retiring the said four hundred thousand dollars (\$400,000) bonds so as aforesaid, made and delivered by the said City Water Works Company, and shall be held in trust by said trustee, and only issued in exchange for, or for the purpose of retiring the aforesaid bonds of said City Water Works Company on such terms and in such manner as may be stated in the mortgage executed under the authority of these resolutions.

Resolved, that five hundred (500) of said bonds by these resolutions authorized, being bonds numbered from number two thousand and one (2001) to number two thousand five hundred (2500), both inclusive, be deposited with the said The Farmers' Loan and Trust Company, as trustee, for the purpose of future sale on account of the making of such improvements, extensions, enlargements and additions now determined upon, and that the same shall be delivered by the said The Farmers' Loan and Trust Company to the order of the President and Secretary of this Company at any time after January 1st, 1888 upon substantially the following terms and conditions, viz: If it shall be made to appear to the said trustee by a sworn certificate of the President and Treasurer of this Company that the net income of this Company from its Omaha property is sufficient to pay interest at six per cent per annum on two million five hundred thousand (\$2,500,000) dollars, the said trustee will deliver said five hundred (500) bonds in lots not exceeding one hundred (100) bonds in any

one month upon the order of the President and Secretary of this company under the seal thereof.

Resolved, That fifteen hundred (1500) of said bonds by these resolutions authorized, being bonds numbered from number two thousand and five hundred and one (2501) to number four thousand (4000) both inclusive, be deposited with the said The Farmers' Loan and Trust Company, as trustee, for the purpose of future sale for the making of enlargements, extensions, improvements and renewals in the future as aforesaid, but none of the same shall be delivered or issued or suffered to be outstanding previous and prior to the first day of July, A. D. 1888, and then only in substantially the following manner: When the board of directors of this Company shall have determined to make any improvements, enlargements, extensions or renewals, of its works and plant, at or near Omaha, and shall after said first day of July, 1888, have expended in cash the sum of at least fifty thousand dollars (\$50,000) therefor, and shall present to the said trustee a statement of such improvements, extensions, additions, or renewals, together with an itemized statement of the cost thereof, verified by the oath of the President and Secretary of this Company, it shall be the duty of said trustee to deliver to the order of said President and Secretary so many of said fifteen hundred (1500) bonds then remaining in trust with said trustee, as shall be sufficient at par to pay the said disbursements made on account of such improvements, enlargements, extension or renewals, but not exceeding one hundred thousand dollars (\$100,000) of said bonds in any one month, provided that said trustee shall require of this Company a statement of the actual income, expenses, and taxes during the six months next preceding any application for such bonds, verified by oath of its President and Treasurer, and if it shall appear from said statement that the actual income of the Company at the rate of income for said six months, over and above operating expenses, taxes, and interest on the bonds authorized by these resolutions then already outstanding, is sufficient to pay the interest on the additional bonds applied for, it shall be the duty of said trustee to issue and deliver the same to the order of the President and Secretary of this Company under the seal thereof.

Resolved, the said trustee shall as often as a semi-annual payment of interest becomes due, cut off and cancel the coupons attached to all of said bonds so remaining in trust with it, so that none of the said bonds shall be issued with any past due coupons thereon.

Resolved, that this Company shall reserve in the bonds and the mortgage securing the same, the right at or before the issuing any of said bonds numbered from number two thousand and one (2001) to number four thousand (4000), both inclusive, to reduce the rate of interest thereon to five per cent per annum, payable semi-annually, and in case such reduction of interest on any of said bonds, shall be desired, this company shall certify under its seal and the signatures of its President and Secretary to the said trustee, its determination to reduce the rate of interest on any of its bonds last aforesaid, and said trustee shall cause to be endorsed or stamped on each of said bonds upon which it has been determined to reduce the rate of

interest, a statement of the fact in such words as may be fixed and determined upon and set forth in the mortgage securing said bonds.

321 Resolved, that to secure the payment of said four thousand (4000) bonds, or so many of them as shall at any time be outstanding, without preference or priority, interest and principal, this Company make, execute and deliver to The Farmers' Loan and Trust Company of the City of New York, the said trustee above named, a mortgage of all its works, plant, property real and personal mains, pipes, choses in action and assets of every kind and description, situate in the County of Douglas, state of Nebraska, and all rents, dues and demands from the City of Omaha and from private consumers at Omaha and elsewhere in said County of Douglas, in such form and with such covenants, agreements, conditions and stipulations and provisions as to the said President and Secretary of this Company shall seem best, provided, however, that nothing in said mortgage contained shall be in contravention of anything in these resolutions expressly contained but otherwise at the discretion of said President and Secretary, and when the said bonds and the said mortgage shall be executed by the President and Secretary in the name of this Company under its seal, they shall be the bonds and mortgage of this Company and such execution thereof shall be evidence in all courts and places of the approval by this company of the terms of said bonds and mortgage and of their due execution by this corporation;

And Whereas, the said The American Water Works Company in pursuance of said resolutions, has made, executed and delivered its four thousand negotiable bonds of the sum of one thousand dollars each of the form, tenor and effect following, that is to say:

UNITED STATES OF AMERICA.

Omaha Water Works.

Six per Cent. First Consolidated Mortgage Bonds.

Issued by the American Water Works Company.

No. —.

\$1000.

On the first day of July, 1907, for value received The American Water Works Company, a corporation organized under the laws of Illinois, promises to pay to bearer, One Thousand Dollars with interest at the rate of six per cent per annum, payable semi-annually, on the first days of January and July in each year, on presentation and surrender of the coupons hereto annexed as they respectively become due, both principal and interest payable in lawful

322 money of the United States at the office of The Farmers' Loan and Trust Company in the City of New York, N. Y.

This bond is one of a series of Four Thousand of like tenor and effect, amounting to the sum of Four Million Dollars, First Consolidated Mortgage Bonds, authorized to be issued by The American

Water Works Company, two thousand of which, numbered from number two thousand and one to number four thousand, both inclusive amounting to Two Million Dollars, are placed in trust with said The Farmers' Loan and Trust Company for future extensions, improvements and enlargements of the Water Works at Omaha, Nebraska, all of which bonds are secured by a duly authorized executed, and recorded deed of trust, bearing even date herewith, conveying the property real and personal of said corporation, located in the County of Douglas and State of Nebraska, in and about the City of Omaha, including its income from the Water Works by which the City of Omaha and the inhabitants thereof are supplied with water, and the franchises therefor, to the said The Farmers' Loan and Trust Company in the City of New York, Trustee.

The American Water Works Company reserves the right when the said Two Million Dollars of Bonds so placed in trust are issued to reduce the rate of interest thereon or any part thereof to Five per cent per annum.

In Witness Whereof, the said The American Water Works Company hath caused this negotiable bond to be executed by its President and Secretary, who each covenant that they are duly authorized in this behalf, and its corporate seal to be hereto affixed, this first day of July, A. D. 1887.

President.

Secretary.

To each of which said bonds forty coupons are attached of the form, tenor and effect following, that is to say:

Coupon.

\$30.00

Omaha Water Works.

\$30.00

January 1st, 1888.

The American Water Works Company will pay the bearer Thirty Dollars at the office of The Farmers' Loan and Trust Company, New York City, for six months' interest due on First Consolidated Mortgage Bond No. —.

Secretary.

323 And upon each of said bonds previous to the delivery thereof, a certificate shall be endorsed by the said The Farmers' Loan and Trust Company of the form, tenor and effect following, that is to say:

Trustees' Certificate.

This bond is one of a series amounting to \$4,000,000 issued in accordance with the trust mortgage referred to within and is entitled to the benefit thereof.

THE FARMERS' LOAN AND
TRUST COMPANY,
By ———, President.

All of which said four thousand bonds have been delivered to the said The Farmers' Loan and Trust Company subject to the following terms:

1st. Bonds consecutively numbered from number one (1) to number sixteen hundred (1600) both inclusive, shall be delivered by the said The Farmers' Loan and Trust Company on demand to any person or persons presenting to it a written order signed by the President and Secretary of the first party under the seal of the first party and upon the delivery thereof said trustee shall endorse on such bonds herein mentioned as shall be so delivered, the trustee's certificate aforesaid.

2nd. Bonds numbered consecutively from number sixteen hundred and one (1601) to number two thousand (2000) both inclusive, shall be retained by the said The Farmers' Loan and Trust Company in trust for the purpose of retiring the four hundred (400) bonds heretofore made and delivered by the said City Water Works Company of Omaha, as mentioned aforesaid, under the provisions and subject to the conditions hereinafter specified.

The said The Farmers' Loan and Trust Company shall at any time upon the written request of the President and Secretary of the first party, sell any and all of said four hundred (400) bonds mentioned in this second clause, provided the same can be sold for not less than par in cash, and the proceeds keep and retain for the purpose of retiring paying and discharging the said bonds so issued by the said City Water Works Company of Omaha, and shall at any time during the continuance of this trust, on demand and presentation at its office in the City of New York, exchange any and all of the said bonds mentioned in this second clause, par for par, for an equal number of the bonds so issued by said City Water Works Company of

324 Omaha, and upon selling or exchanging the said bonds so secondly mentioned as deposited with it shall endorse thereon the trustees' certificate aforesaid.

3rd. Bonds numbered consecutively from number two thousand and one (2001) to number two thousand five hundred (2500) both inclusive, shall be retained by the said The Farmers' Loan and Trust Company, as trustee, and shall be delivered by the said The Farmers' Loan and Trust Company to the order of the President and Secretary of the first party at any time after January 1st, A. D. 1888, upon the following terms and conditions, viz:

Whenever it shall be made to appear to the said second party by a sworn certificate of the President and Treasurer of the first party that the net income of the first party from its Omaha property is sufficient to pay interest at six per cent per annum on two million five hundred thousand dollars, (\$2,500,000) the said trustee shall deliver the said five hundred bonds (500) in lots not exceeding one hundred bonds (100) in any one month upon the order of the President and Secretary of the first party under the seal thereof.

4th. Bonds numbered consecutively from number two thousand five hundred and one (2501) to number four thousand both inclusive, shall be retained by the said The Farmers' Loan and Trust Company, for the purpose of future sale for the making of enlargements,

extensions, improvements and renewals of said water works and plant, but none of the same shall be delivered or issued or suffered to be outstanding previous and prior to the first day of July, 1888, and then only on the terms and conditions following, that is to say:

Whenever the Board of Directors of the said The American Water Works Company shall have determined to make any improvements, enlargements or extensions to the works and plant of said Company at or near Omaha, after July 1st, 1888, and shall have after said last-mentioned date expended in cash at least the sum of fifty thousand dollars (\$50,000) therefor, and shall present to the said trustee a statement of such improvements, extensions and renewals, together with an itemized statement of the cost thereof, certified by the oath of the President and Secretary of said Company, it shall be the duty of said trustee to deliver to the order of said President and Secretary so many of said fifteen hundred (1500) bonds then remaining in trust with it under the terms of this clause as shall be sufficient par to pay the said disbursements so made on account of said improvements, enlargements, extensions or renewals, but not exceeding one hundred thousand dollars (\$100,000) of the bonds mentioned in this clause shall be delivered in any one month.

Provided, however, that said second party before delivering any of said bonds last-mentioned shall require of the first party a statement of the actual income, expenses and taxes, of said first party during the six months next preceding any application for any of said last-mentioned bonds, to be verified by the oath of the President and Secretary of the first party. And unless it shall appear from the said statement that the annual income of the Company at the rate of income for the said six months over and above operating expenses, taxes and interest on bonds, secured by this mortgage then already outstanding, is sufficient to pay the interest on the bonds applied for, no bonds shall be then issued, but if the net income aforesaid shall be sufficient to pay such interest, it shall be the duty of the said second party, as such trustee, forthwith to issue and deliver so many of said last-mentioned bonds as shall be sufficient for the purpose aforesaid to the order of the President and Secretary of the first party.

5th. While any of the said four thousand (4000) bonds shall so remain in the custody of the said trustee the same shall not be considered to be outstanding or negotiated, but upon the delivery by the said trustee and the endorsement of said trustee's certificate thereon, they shall be deemed to be outstanding and negotiated to be paid with pro rata equality with all other bonds of said four thousand (4000) which shall be outstanding and negotiated and entitled to an equal pro rata benefit of all the provisions of this instrument.

The said The Farmers' Loan and Trust Company, shall as often as any installment of interest becomes due on such bonds cut off, deface and cancel the coupons as they respectively become due upon all of said bonds remaining in its custody under the provisions of this instrument and the said coupons so cut off, defaced and cancelled, return to the party of the first part and take its receipt therefor.

6th. Whenever any of said bonds so placed in trust, as aforesaid, with the said The Farmers' Loan and Trust Company, shall be issued

and delivered by said trustee, the said trustee shall stamp or endorse upon each bond so delivered by it the trustee's certificate aforesaid.

7th. The right is reserved to the party of the first part at any time at or before the issue and delivery by said trustee of any of said bonds numbered from number two thousand and one (2001) to 326 number four thousand (4000) both inclusive, to reduce the rate of interest thereon to five per cent per annum, payable semi-annually, and in that case the said first party shall certify under its seal and the signatures of its President and Secretary to the said trustee its determination to reduce the rate of interest on any of its bonds last aforesaid, and the said trustee shall thereupon cause to be endorsed or stamped upon the face of each of said bonds upon which it has been determined to reduce the rate of interest, the words: "Interest upon this bond reduced to and fixed at five per cent per annum before issue" and upon the face of each coupon the words: "Reduced to twenty-five dollars."

in the state of Nebraska, in and about its works, plant and property, used for the purpose of supplying the City of Omaha, its inhabitants and others in said County of Douglas with water for all purposes, whether or not the same be mentioned herein among which are the following, that is to say, All and Singular the following described property, situate, lying and being in the County of Douglas, in the State of Nebraska, known, described and designated as follows, to-wit:

All those tracts or parcels of land situate in the City of Omaha, County of Douglas, State of Nebraska, known and described as follows:

1st. Beginning at the intersection of Lowe Avenue and the north line of Nicholas Street, thence north two hundred and ninety-eight (298) feet, thence east six hundred and four feet (604), thence south two hundred and ninety-eight (298) feet, to Nicholas Street, thence west six hundred and four (604) feet to the place of beginning.

2nd. Beginning at a point where the west line of Pleasant Street intersects the south line of Hamilton street, thence westerly four hundred and thirty-three (433) feet, thence south seven hundred and four and eight-tenths (704 8-10) feet, to the north line of Nicholas Street, thence east four hundred and thirty-three (433) feet to Pleasant street, thence north seven hundred and twenty-five (725) feet to the place of beginning.

3rd. Beginning at the intersection of the east line of Lowe Avenue with the south line of Hamilton Street, thence easterly on the south line of Hamilton street six hundred and four (604) feet, thence south four hundred and six and eight-tenths (406 8-10) feet, thence west parallel with the half section line six hundred and four (604) feet to the east line of Lowe Avenue, thence north on the 327 east line of Lowe Avenue four hundred and three-tenths (40- 3-10) feet to the place of beginning.

4th. Lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7) and eight (8) in block Q of the City of Omaha according to the recorded plat thereof.

5th. Lots one (1), two (2), five (5) and six (6), in block three hundred and twenty-eight (328) in the City of Omaha, according to the recorded plat thereof.

And also all rentals, debts, dues, demands, choses in action of every kind and nature, including water rents from the said City of Omaha under and by virtue of a contract made between the said City of Omaha and one Sidney E. Locke and afterwards assigned by the said Locke to the said City Water Works Company of Omaha and by the said first named corporation to the first party; and under and by virtue of any contract now existing or which may hereafter exist between the City of Omaha and the party of the first part or its assigns, or which enures to the benefit of the said first party and its assigns by assignment or otherwise, and all water rents from private consumers wheresoever situate and all other income of any kind whatsoever from any property or person in said County of Douglas, in the State of Nebraska.

And the said party of the first part hereby makes, constitutes and appoints the party of the second part its successors and assigns, as true and lawful attorney, in fact, in its name, and in its place and stead, to have, receive, sue for, demand, collect and receipt for all said debts, dues, demands, choses in action and water rents hereby conveyed for the purposes of the trusts in this mortgage expressed.

And this instrument shall further work and be an absolute assignment of said debts, dues, demands, choses in action and water rentals, both those now existing or which may at any time hereafter exist, or be derived in said County of Douglas, and of the property of the said The American Water Works Company in the said County of Douglas, to the said second party as said trustee, to the extent and for the uses and purposes expressed hereinafter.

To Have and To Hold the said rights, privileges, easements, choses in action, property real and personal, estate, effects and assets above conveyed, to the said party of the second part, as trustee, its successors and assigns, in trust nevertheless and subject to the following stipulations, covenants and agreements, as trustee, that is to say:

328 1st. This mortgage is given for the purpose of securing the payment:

(A). Of the interest on such of said bonds as shall be at any time, during the continuance of the lien of this mortgage, outstanding or negotiated:

(B). The principal of such of said four thousand bonds, heretofore described, as shall be outstanding and negotiated at any time during the continuance of this mortgage, according to the provisions and agreements contained in said coupons and bonds respectively, pro rata, and without preference or priority between different bonds, (it being understood that the lien of this mortgage is to secure the payment of all interest on any of said bonds in full, prior to the payment of any principal the payments to be made said bondholders by said trustee or by any receiver or officer acting as master in Chancery, or in case of foreclosure, however the moneys shall come

to the said trustee, master or receiver, shall be made pro rata, first, to pay said interest, and second, said principal without preference or priority between bonds, and each of said bonds which may be at any time outstanding and negotiated shall be deemed to be equally secured by this mortgage and all conveyances or mortgages supplementary hereto.

2nd. So long as the first party shall observe, do, keep and perform, all and singular, the promises, agreements, covenants and stipulations, in said bonds and coupons, and in this mortgage contained, and shall well and truly pay, or cause to be paid the interest and principal of the debt evidenced and promised to be paid by said bonds, and coupons, [if] the time, in the manner, and at the place therein mentioned for the payment thereof it, the said first party, may retain possession of all the mortgaged rights, franchises, privileges, easements, estate, choses in action, property, real and personal, effects, and assets, without let or hindrance from the second party.

3rd. In case the said first party shall pay the interest on said bonds as the same becomes due and payable, at the time, in the manner, and at the place the same is payable, according to the terms of said bonds and coupons, and shall well and truly pay the principal of said bonds at the time, in the manner, and at the place for the payment thereof, according to the terms of said bonds, and shall upon demand pay all the expense of administering the trust, and shall, during the continuance of the lien of this mortgage, observe, do, keep and perform all the covenants, agreements, and stipulations herein contained, and all the things to be by it observed, done, kept and performed, according to the terms of

329 the said bonds and coupons and this mortgage, then the said party of the second part shall cause this mortgage to be released and discharged, (but at the expense of the first party), and all the mortgaged rights, privileges, franchises, easements, choses in action, property, estate effects, and assets, shall be released from the operation of the same.

4th. But should the said party at any time make any default in the payment of the interest on said bonds or any instalment, or part of any instalment thereof, at the time, in the manner or at the place when and where said interest or any instalment or part thereof, shall be due and payable according to the terms of said bonds and coupons, or should the said first party make any default, or neglect or refuse or in any manner fail to observe, do, keep and perform, all the singular, each and every covenant, promise, agreement and stipulation in said bonds and coupons and this mortgage contained and by it to be observed, done, kept and performed, then the said second party may, at its option, in case such default, neglect, refusal or failure shall extend for the period of ninety days, declare the whole sum, principal and accrued interest evidenced by said bonds and coupons then outstanding and unpaid, to be then immediately due and payable and in default.

5th. In case of any default in the payment of the principal sum evidenced by said bonds according to the provisions and agreements therein contained, or any default in the payment of interest accord-

ing to the provisions and agreements, of said bonds and coupons, and in case of any default, neglect, refusal or failure to observe, keep and perform, all and singular, each and every covenant, agreement, provision and stipulation in said bonds and coupons and this mortgage contained and by said first party to be observed, kept and performed; all the rights of the first party to retain any possession of the mortgaged rights, privileges, franchises, easements, choses in action, estates, property real and personal, effects and assets, shall immediately cease, and therefrom the right of possession of the same shall immediately vest in said second party, and the said second party may at once enter into possession thereof and the said first party and each and every occupant remove and put out, and may have, receive, sue for, collect and receipt for in its own name or that of the first party or any assignee of the first party, all and singular the water rentals and prices due and to become due from the City of Omaha or from private consumers or others on account of water supplied for fire, domestic and other purposes, and all and singular the income of the first party, from whatever source derived, receive, and have all debts, dues and demands, of whatever nature
330 or kind receive, receipt for, have and appropriate to the purposes of the trust created by this instrument; and may during said time as to it may seem fit and best, with or without foreclosing this mortgage, continue in the possession of the mortgaged income, rights, privileges, franchises, easements, choses in action, estates, property real and personal, effects and assets, and operate and carry on the works and business of the first party, and carry out and perform the contracts of the first party with its customers for the supplying of water, including the city of Omaha, and make new contracts for the supplying of water, and by means of the works, machinery, mains, pipes and valves of the first party supply water and do, all and singular, the acts and things which the said first party could do in the premises, if it had remained in the possession of the same.

6th. And in case of any default as aforesaid, in the payment of interest or principal upon said bonds or coupons according to the terms and provisions thereof, which shall continue for ninety days, or in case of any default, neglect, refusal or failure to observe, do, keep and perform, all and singular the covenants, conditions, promises, agreements and stipulations, in said bonds, and coupons or in this mortgage contained, it shall and may be lawful for the said second party to foreclose this mortgage and forever bar the first party of all equity of redemption therein, and in case of such foreclosure or proceedings therefor, the said second party may, at the commencement of suit and before any plea, answer or demurrer is filed, apply for the appointment of a receiver of all the rents and profits, debts, dues, demands and choses in action and the property, estate and assets of the first party hereby mortgaged or conveyed or intended so to be, or which it shall then possess or be entitled to or interested in, and such receiver shall be appointed without any opposition from the first party, and such receiver shall be vested with all the rights and privileges and subject to all the duties and obliga-

tions granted to and obligatory upon the second party in case of entry into possession, and as specified in the fifth subdivision of this mortgage; and in case of any foreclosure of this mortgage, the whole sum of the indebtedness evidenced by said bonds and coupons, both principal and interest, shall be deemed to be due and payable, and such foreclosure shall be to satisfy such whole sum.

7th. In no event shall any expense of any kind fall upon said trustee; but all its expenses and costs, including the fees and charges of attorneys and agents employed by it in good faith in the administration of the trusts herein contained, shall be paid by the first party.

331 8th. In case of an entry and taking possession by the second party, or in case of any foreclosure proceedings, or in case of any appointment of any receiver, or in any case of the receipts of any moneys by the second party, or any receiver or officer of court, from any income, debts, dues or demands, collected or received by it, him, or them, from any sale of the things or any of them herein mortgaged or conveyed or intended so to be, or hereafter conveyed by any assignment, conveyance or supplementary mortgage, the costs and expenses of all kinds of the said trustee in the administration of the trust, of foreclosure and sale, of courts, officers and receivers, shall be first paid out of said moneys, and the surplus, if any, shall be devoted to paying the whole of the indebtedness secured hereby, interest and principal, pursuant to the terms of the first above clause, until the whole thereof is paid; and if there should remain any surplus, the same shall be paid over to the first party.

9th. It is stipulated and agreed that said second party will safely keep said four hundred (400) bonds numbered consecutively from sixteen hundred and one (1,601) to number two thousand (2000), both inclusive, to be deposited with it as aforesaid, and will not issue or deliver the same, or suffer the same to become outstanding, except for the uses and purposes of exchanging, redeeming and purchasing the said four hundred thousand dollars (\$400,000) of bonds so as aforesaid issued by said City Water Works Company of Omaha; and that said second party will hold, use and dispose of the same for said purposes, and will deliver the same in exchange as aforesaid, according to the terms of the provisions hereinbefore in this mortgage contained in reference to the trusts upon which the said four hundred (400) bonds are so deposited with the said second party.

And the said second party hereby stipulates and agrees that it will safely keep the five hundred bonds, numbered consecutively from number two thousand and one (2,001) to number two thousand five hundred (2500) both inclusive to be deposited with it according to the resolutions hereinbefore set forth and the tenor of this instrument and will not issue or deliver the same, or suffer the same to become outstanding, until after the first day of January, A. D. 1888; but that after the first day of January, A. D. 1888, it will issue and deliver the same upon the order of the President and Secretary of the first party under the seal of said first party.

And the said second party hereby stipulates and agrees that it will

safely keep the fifteen hundred (1500) bonds, numbered consecutively from number two thousand five hundred (2,500) to 332 number four thousand (4,000), both inclusive, to be deposited with it according to the resolutions hereinbefore set forth, and the terms of this instrument, and will not issue or deliver the same, or suffer the same to become outstanding, except for the uses and purposes expressed in this mortgage, and will hold, use and dispose of the same for such purposes according to the terms and provisions of this instrument contained, but will at any time after July first, A. D. 1888, deliver so many of the same under the circumstances and upon the conditions and with the limitations hereinbefore in this mortgage expressed, and in said resolutions contained, as shall be necessary at par to provide means for the making of improvements, extensions, enlargements, additions and renewals, as aforesaid.

It is stipulated and agreed that the certificate of the president and secretary under the seal of the first party shall be sufficient evidence of the action of the first party in ordering the issue and delivery of any of the bonds secured by this mortgage, and such certificate shall be conclusive evidence of the necessity for the enlargements, additions, improvements and renewals, or either of the same, to procure the issue of said fifteen hundred (1,500) bonds last mentioned and placed in trust.

10th. The party of the second part, as trustee or otherwise, shall be under no obligation to recognize any person or persons, firm or corporation, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do or to refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or owner, until such supposed holder or holders, shall produce the said bonds and deposit the same with the trustee, and shall indemnify and save harmless the trustee, to its full satisfaction, from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements for which it may become liable or responsible on proceeding to carry out such request or demand.

11th. The right of action under this Indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or number of bondholders have any right to institute an action or other proceeding on or under this Indenture, for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provision of this Indenture shall be instituted and conducted by the trustee according to its sound discretion; but the trustee shall be under no obligation to institute 333 any such suit or to take any proceedings under this Indenture until it shall be indemnified to its full satisfaction for all the expenses and costs of every kind, and also for all possible claims for damages.

12th. Should any suit or other proceeding be brought against the trustee by reason of any matter or thing connected with the trusts

hereby created, or by reason of its being such trustee, it shall be under no obligation to enter any appearance by counsel, or in any way appear in and defend the said suit or other proceeding, until indemnified to its satisfaction for so doing but it may nevertheless appear and defend the same without indemnity, if it shall elect to do so, and in such case it shall be compensated therefor from the trust fund.

13th. In case at any time it shall be necessary or proper for the trustee to make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing anything as such trustee, the certificate of the party of the first part, under its corporate seal, attested by the signature of its president and the affidavit of one or more directors, shall be sufficient evidence of such fact to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

14th. It shall be no part of the duty of the party of the second part to see to the recording of this Indenture as a mortgage or conveyance of real estate, or to the filing thereof as a chattel mortgage, or renewing such mortgage, or to do any other act which it may be suitable and proper to be done for the continuing of the lien of this Indenture, or for giving notice of the existence of such lien; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance.

15th. The trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable, in any case, for the act or default of any agent or attorney or employee selected with reasonable discretion; nor shall it be responsible for the issue and delivery to the order of said first party of any of said fifteen hundred (1,500), bonds so as last aforesaid placed in trust within the limits in this instrument contained.

16th. The trustee shall be entitled to be reimbursed — all proper outlays of every sort or nature by it incurred in the discharge of its trust, and to receive a reasonable and proper compensation
334 for any duties that it may at any time perform in the discharge of the same; and all such fees, commissions, compensations and disbursements shall constitute a lien on the mortgaged property and premises.

17th. It is further stipulated and agreed that in case the said trustee shall desire, for any reason, to surrender the trust conferred upon it by this instrument, it may at any time do so, and may nominate its successor, and if the person so nominated is a fit and proper person, the said first party shall by resolution of the board of directors, confirm the said nomination, and certify the same to the second party; and in such case the said second party may transfer the trust by deed properly executed, to the successor so chosen, or the second party may in its discretion in the first instance, or in case the parties fail to agree, and with or without the consent of the first party, apply to any court then having equity jurisdiction in the county in which the mortgaged property, or any part thereof, shall then be situated, either a court of the United States or of the state of Nebraska, for the

appointment of such successor, and such court may appoint a successor to the second party; and it is agreed and stipulated that the successor so appointed, whether by act of the parties or by a court, upon accepting the same, shall succeed to all the interest rights, and privileges, and be subject to all the duties and obligations, pertaining to the second party hereto, and to all intents and purposes become and be the second party to this instrument and any subsequent or supplementary assignment, conveyance, or mortgage, the same as if originally named therein.

18th. And it is further stipulated and agreed that during the continuance of this mortgage the said first party will not commit, or suffer to be committed, any waste of its property or assets, that it will not release any contract it now has for the supplying of water to the city of Omaha, or any person or persons, whereby the income of the first party shall in any way be diminished, either annually or in gross, without the consent of the second party.

It is further stipulated and agreed that, at all times during the continuance of this mortgage, it will promptly, and before any penalty or forfeiture shall attach, in due season pay or cause to be paid all taxes, levies, and assessments laid upon it or its property or assets by any lawful authority; and in case of failure to do so, the said trustee may pay the same, and add the same to the sum secured by this mortgage, and the same with six per cent. interest, shall be preferred to the debt evidenced by said bonds and coupons; and any

breach of this agreement for the payment of taxes for the
335 space of three months shall entitle the trustee to declare the whole sum due, and to enter and take possession, or to foreclose this mortgage, or both; and it is further stipulated and agreed that, during the continuance of this mortgage, the said first party will not do, or suffer to be done any acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired.

19th. It is understood and agreed that, all the conveyances covenants, agreements, and stipulations herein mentioned and contained apply to and bind as well the successors and assigns of the respective parties, as the parties themselves.

20th. It is hereby declared that the receipt or receipts of the trustee shall be sufficient discharge to the purchaser or purchasers, at any sale or sales made by the said trustee, under or in pursuance of any or either of the provisions for that purpose herein contained, for his or their purchase money; and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after payment thereof and having such receipt, be liable to see to its being applied for or upon the purposes and trusts of these presents, or in any manner howsoever be answerable for any loss, misapplication or non-application of such purchase moneys, or any part thereof; or be obliged to inquire into the necessity, expediency, or authority of or for any such sale.

21st. No delay or omission of the said trustee or the holders of the bonds secured hereby, in respect of any default happening or continuing as aforesaid, to exercise the rights and powers arising

therefrom, as hereinbefore provided, shall be held to exhaust or impair such rights, and powers, or be construed to be a waiver of such defaults; but it is hereby mutually agreed, as a condition, subject whereto the bonds secured hereby are issued and held by each successive holder, and that the holders of a majority in interest, at any time outstanding, may be an instrument under their hands and seals, or resolution adopted at a meeting of such bondholders, waive, or instruct the trustee to waive, any default accruing, and the rights accruing therefrom, on such terms and conditions, or without any conditions, as to such majority may seem proper; provided always, that no such action of the bondholders shall extend to or be taken to affect any subsequent default or impair the rights resulting therefrom, unless expressly provided for.

Any such majority of bondholders may in like manner, if upon default, as hereinbefore provided, the principal of all or any of the bonds secured shall have become or be by said trustee declared, 336 due and payable before the period therein mentioned for the payment thereof shall have expired, waive such default or reverse the action of said trustee in that behalf; and on default in the payment at maturity of the principal of any of the bonds secured hereby, such majority may, in like manner, waive such default and any rights arising thereunder respecting any bonds secured hereby not then matured, and extend the time for the payment of the principal of such as shall have matured, or any part thereof, for such period or periods not exceeding five years, with provisions for interest in the meantime, as to such majority shall seem proper provided the rate of interest shall not be reduced unless the reduction be uniform on all the bonds at the time outstanding, and ratably on the rate therein provided respectively; and if, upon any default as aforesaid, the said trustee shall, either on his own motion or after requisition and indemnification, proceed to execute the power of entry, or that of sale, or both, or take legal proceedings for the enforcement of the rights of the bondholders accruing from such default, it shall be competent for such majority in interest, in manner aforesaid, to instruct the said trustee to suspend or postpone the execution of such powers, or the prosecution of such legal proceedings, for a period, definite or indefinite, but not longer than five years with such uniform provisions, with regard to interest accruing or principal maturing in the meantime, and arrears of interest on bonds matured, as to such majority may seem expedient; which instruments, if so given, shall be controlling and shall be conformed to; and any such action by the majority, as in this article provided, shall be binding and conclusive upon all the bondholders, the intent of this provision being to afford time for the resuscitation of the company's finances, in case of disaster thereto, or disappointment of the present expectations, if a majority in interest of such bondholders shall deem it expedient.

22d. On any sale, whether by the said trustee or the court, of the property hereby conveyed, or any part thereof, the trustee shall have the right to buy in the same, and a majority in amount of the bondholders of the outstanding bonds shall have the right, by a

written instrument, under the hands and seals of such majority, to fix a sum, which it shall be the duty of the trustee to bid for the property to be sold, on behalf and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of the said trustee, or a court, as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of these presents, and of the proportion of such sum payable to the bondholders not concurring in such request.

337 On any purchase the trustee shall hold the property so purchased upon trust for the equal benefit of the bondholders who had required the trustee to buy in the property in their behalf, as the absolute property of said bondholders without any right of redemption or re-sale in favor of said company or any bondholder.

23d. The trustee shall have power to release from the lien of this mortgage any land, machinery, or other property which has become useless for the purposes of the company from any cause, but only on condition that such property be forthwith replaced by other property of equal value and subject to the lien of these presents.

24th. And whereas, by distance and lapse of time, or other accident, the dates of the actual execution of this Indenture of mortgage and trust, by the various parties, thereto may be previous or subsequent to the day on which it bears date, now it is expressly agreed and declared that this Indenture of mortgage and trust shall be dated the first day of July A. D. 1887, and shall be valid and effectual as if executed on the day of the date thereof; and this indenture of mortgage, and trust is the indenture of mortgage referred to in the bonds hereinbefore mentioned, the form whereof is hereinbefore set forth, and is made and executed by and between the parties hereto, as and for the indenture of mortgage and trust securing and intended to secure said bonds, as in the said bonds is mentioned and recited.

And in further consideration of the premises, the said first party, for itself, its successors and assigns, doth covenant, grant, bargain and agree to and with the said second party its successors and assigns, that it is well seized of all the mortgaged property and assets; that there is no incumbrance on any of its property, rights, choses in action, or assets hereby conveyed or intended so to be, except the mortgage executed by the said City Water Works Company of Omaha to secure said four hundred (400) bonds and that all said rights, privileges, easements, estate property real and personal, effects and assets, hereby conveyed and mortgaged, or intended so to be, against all lawful claims, except said mortgage, it will forever warrant and defend.

And in further consideration of the premises, the said first party for the further assurance of the second party and the holders of said bonds, doth covenant, grant, bargain and agree to and with the second party, that it will at any time in the future, upon demand, at its own expense, execute, deliver and record (if proper for record) all such further and other conveyances, assignments and
338 supplementary mortgages of the rights, privileges, easements, estate, choses in action, property real and personal, effects

and assets, now owned by it, whether covered by this conveyance or not, situate in the said county of Douglas in the State of Nebraska, and of any right, privilege, easement, estate, chose in action, property real and personal, effects and assets, which it may at any time hereafter acquire in said county of Douglas and State of Nebraska, and in any wise connected with the property mortgaged, as the second party may demand, to subject the same to the lien of this mortgage and such further and other conveyances, assignments and supplementary mortgages, shall be deemed a part of this instrument, and form together one security for the payment of the debt evidenced by said bonds and coupons.

And in further consideration of the premises, the said first party doth covenant, bargain, and agree to and with the said second party, that during the continuance of this mortgage it will not suffer or permit any lien of mechanics or material men or others of any kind, or any incumbrance of any kind, upon any of the property hereafter to be acquired, or assets, which shall be a prior lien to the lien of this mortgage, or before the execution of an instrument subjecting the same to the lien of this mortgage.

The recitals herein contained are made on behalf of the party of the first part, and the party of the second part assumes no responsibility as to the correctness of any statement therein contained.

In Witness Whereof the said The American Water Works Company hath caused these presents to be executed by its president and secretary and sealed with its corporate seal at the city of Chicago in the county of Cook and state of Illinois, this first day of July, A. D. 1887.

THE AMERICAN WATER WORKS
COMPANY,

[L. s.]

By J. R. CUSTER, *President.*

JOSEPH A. GRIFFIN, *Secretary.*

In presence of

WILLIAM J. CAMPBELL.

STATE OF ILLINOIS,

County of Cook, ss:

On this eleventh day of July A. D. 1887, personally came before me, a notary public in and for said county, J. R. Custer, President and Joseph A. Griffin, Secretary of the said The American Water Works Company, personally known to me to be such officers, and to be the same persons who as such President and Secretary of the said The American Water Works Company executed the foregoing instrument by its name and in its behalf by them as such President and Secretary, and each acknowledged in behalf of said corporation that the foregoing instrument was the free and voluntary act and deed of the said The American Water Works Company, executed by it for the uses and purposes therein mentioned.

BEN. S. MAYER, [L. s.]
Notary Public.

The Farmers' Loan and Trust Company of New York above named, hereby accepts the trust created by the foregoing instrument.

Dated New York 13th July A. D. 1887.

THE FARMERS' LOAN AND
TRUST COMPANY,

By R. G. ROLSTON, *President*. [L. s.]

Attest: WM. H. LEUPP, *Sec'y*.

Witness,
EDWIN F. CONEY.

STATE OF ILLINOIS,
Cook County, ss:

I, Henry Wulfe, Clerk of the County Court of Cook County, *that* same being a Court of Record, Do Hereby Certify that Benj. S. Mayer, Esq., whose name is subscribed to the proof or acknowledgment of the annexed instrument in writing was at the time of taking such proof or acknowledgment, a Notary Public in and for the Cook County, duly commissioned, sworn and acting as such and authorized to take the same; that I am acquainted with his handwriting and verily believe that the signature to the said proof or acknowledgment is genuine; and further that the annexed instrument is executed and acknowledged according to the laws of the state of Illinois.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Chicago, in the said County, this 11th day of July, 1887.

[L. s.]

HENRY WULFF, *Clerk*.

STATE, COUNTY, AND CITY OF NEW YORK, *ss:*

On this thirteenth day of July A. D. 1887, personally appeared before me a notary public in and for said county of New York, Rosewell G. Rolston President of The Farmers' Loan and Trust Company of New York, and known by me to be such officer and to be the same person who as such President of the said The Farmers' Loan and Trust Company of New York, executed the foregoing instrument in its name and in behalf by him as such President and acknowledged in behalf of said corporation that the foregoing instrument was the free and voluntary act and deed of the said The Farmers' Loan and Trust Company of New York, executed by it for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[L. s.]

EDWIN F. COREY,
Notary Public.

STATE OF NEW YORK,

City and County of New York, ss:

I, James A. Flack, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do hereby Certify, that Edwin F. Corey whose name is subscribed to the Certificate of the proof or acknowledgement of the annexed Instrument, and thereon written, was, at the time of taking such proof or acknowledgement, a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 14th day of July, 1887.

[L. S.]

JAMES A. FLACK, *Clerk.*

EXHIBIT B.

This Indenture, made and entered into this sixteenth day of January A. D. 1889, by and between the American Water Works Company, a corporation organized under the laws of the State of Illinois, and having its principal office at the City, of Chicago, Illinois, party of the first part, and The Farmers' Loan & Trust Company, of the City, County, and State of New York a corporation organized under the laws of the State of New York, having its principal office at the City of New York, as trustee, party of the second part, Witnesseth:

That Whereas, the said first party is a corporation organized under the laws of the State of Illinois, having its principal office and place of business at the City of Chicago, Cook County, in the State of Illinois:

341 And Whereas, the said first party is authorized to build equip and operate works to supply water to cities, towns, and villages, and municipal and other corporations, to acquire by purchase, lease, or otherwise such works, and operate and deal in stocks and bonds of other corporations organized for a similar purpose, both in the said State of Illinois and elsewhere:

And Whereas, the said first party heretofore purchased of and from the City Water Works Company of Omaha, a corporation organized under the laws of the State of Nebraska, its water works, including the real estate connected and used with the same, by means of which the said City of Omaha and its inhabitants were and are supplied with water for fire and other purposes, including the contract under which the said City Water Works Company of Omaha furnished and supplied water to the City of Omaha, and all contracts with private consumers:

And Whereas, after said purchase, and on the first day of July, A. D. 1887, the said first party made, issued and delivered to the said second party its four thousand negotiable bonds of one thou-

said dollars (\$1000) each, numbered consecutively from number one to number four thousand, both inclusive, bearing date July 1st, 1887, due and payable July 1st, 1907, with interest at six per cent per annum, payable semi-annually according to the forty coupons annexed to said bonds:

And Whereas, on the said first day of July A. D. 1887, the said first party, in order to secure the payment of said four thousand bonds, made, executed and delivered to the said second party, as trustee, its certain mortgage or deed of trust duly executed by said first party, which said mortgage has been duly recorded in the office of the Register of Deeds of Douglas County, Nebraska, in Book 67 of Mortgages, at page 598, and which said mortgage or deed of trust is hereby referred to and made a part of this instrument, and to which this instrument is supplemental:

And Whereas, in and by said mortgage the said first party conveyed to the said second party as such trustee, for the uses and purposes in said mortgage or deed of trust expressed, all its property, real, personal, or mixed, situated in the County of Douglas, State of Nebraska, choses in action, debts, dues, demands and assets of every kind and nature, including water rents from the said City of Omaha, and all water rents from private consumers wheresoever situate, and all income of any kind whatsoever, situate in or derived from any property or person in said County of Douglas, in the State of
342 Nebraska, a more particular description of which is found in said mortgage or deed of trust:

And Whereas, in and by said mortgage or deed of trust the said first party, for the further assurance of the second party, and the holders of the bonds secured by said mortgage or deed of trust, did covenant and agree to and with the second party, that it would at its own expense, execute, deliver, and record all such further and other conveyances, assignments and supplemental mortgages of the rights, privileges, easements, estates, choses in action, property, real and personal, effects and assets then owned by it, situate in the County of Douglas and State of Nebraska, and of any rights, privileges, easements, estate, choses in action, property, real and personal, effects and assets, which it might at any time thereafter acquire in said County of Douglas and State of Nebraska, in any wise connected with the property mortgaged, to subject the same to the lien of said mortgage or deed of trust, and that such other conveyances, assignments, and supplementary mortgages should be deemed a part of said instrument and form together one security for the payment of the debt evidenced by the said bonds and coupons.

And Whereas, since the execution of said mortgage the said first party has acquired large and valuable real estate in the City of Florence, in the said County of Douglas, State of Nebraska, which said City adjoins the City of Omaha on the north and has thereon constructed large and expensive buildings, settling basins, pipe lines, and other structures, and has built and erected large pumping engines thereon and laid at a large expense a line of thirty-six inch main pipe to connect the same with the system of water works owned and operated by the Company in the said City of Omaha:

And Whereas, since the making of said mortgage or deed of trust the said first party has secured by purchase certain water works situate in the City of South Omaha, Douglas County, Nebraska, which said City of South Omaha immediately adjoins the said City of Omaha, on the south, and has extended water works in the said City of South Omaha, and has connected the same with the water works of said first party in the City of Omaha so that they are operated together as one system:

And Whereas, the said first party has made large extensions of its pipe lines in the City of Omaha, and set up and erected new and additional machinery in said City of Omaha:

And Whereas, demand has been made upon said first party that it execute in accordance with the terms of said mortgage or deed of trust such supplementary mortgage or conveyance as is therein mentioned:

And Whereas, under the terms of said mortgage or deed of trust there have been delivered by said trustee, to the order of this Company, sixteen hundred of said four thousand bonds, numbered consecutively from number one to number sixteen hundred, both inclusive, and four hundred of said bonds, numbered from number sixteen hundred and one to number two thousand, both inclusive, are still held by said second party under the terms of the trust in said mortgage or deed of trust [in] contained against the four hundred bonds which were formerly issued by the City Water Works Company of Omaha, and in said mortgage or deed of trust mentioned, and nine hundred of said bonds numbered consecutively from number two thousand and one to number twenty-nine hundred, both inclusive, have been under the terms and trusts in said mortgage contained delivered upon the order of the said first party, and one hundred more of said bonds, being bonds numbered from number twenty-nine hundred and one to number three thousand, both inclusive, have been ordered to be delivered by the said second party and will be delivered by said second party upon the order of the first party in the month of February, 1889, so that there will then remain in trust one thousand of said bonds, viz: Bonds numbered consecutively from number three thousand and one to number four thousand, both inclusive, in trust with said trustee under the terms and provisions of said mortgage or deed of trust, subject, however, to be withdrawn under the terms and conditions of the trust in said mortgage or deed of trust mentioned:

And Whereas, the said first party in the sale of such of its bonds as have heretofore been issued and sold has realized gold prices for the same:

And Whereas, by the terms of said bonds and mortgage it is provided that the said first party may reduce the rate of interest on any of the last two million of said bonds prior to the sale thereof to five per cent per annum.

And Whereas, all of said nine hundred bonds, numbered from number two thousand and one to number twenty-nine hundred, both inclusive, which have been delivered by said trustee upon the order of the first party are still the property of the first party and unsold:

And Whereas, the officers of the company are able to better sell the bonds of the company lately issued and to be issued at a
344 lower rate of interest, provided the same are made payable in gold coin of the United States of the present standard of fineness:

And Whereas, in order to make any of said bonds payable in gold coin of the United States it is necessary to make them all so payable, both those already issued and sold, and those which may hereafter be issued or sold:

And Whereas, the Board of Directors of said first party has by resolution duly determined to reduce the rate of interest of said one thousand bonds numbered from number two thousand and one to number three thousand, both inclusive, to five per cent per annum, and has determined to have written, printed, or stamped on each of said last mentioned one thousand bonds the words, "Interest upon this bond reduced to and fixed at five per cent per annum before issue" and on each of the coupons the words, "Reduced to twenty-five dollars", and has for the purpose aforesaid determined by resolutions to make all of said bonds and the coupons thereon payable in United States gold coin of the present standard of fineness, and has directed that all said nine hundred bonds, numbered consecutively from number two thousand and one to number twenty-nine hundred, both inclusive, in its possession and all the said remaining eleven hundred bonds now in possession of said trustee, viz: bonds numbered from number twenty-nine hundred and one to number four thousand, both inclusive, have written, printed, or stamped on the face of each bond the words following: "This bond and the coupon thereon will be paid at maturity in United States gold coin of the present standard of fineness", and has directed the said trustee, the second party hereto, to cause upon request of the holders of the bonds of this company, heretofore issued and sold, numbered from number one to number sixteen hundred, both inclusive, the same words, and has also directed the said trustee to cause the said four hundred bonds so held in trust by it as aforesaid, and numbered from number sixteen hundred and one to number two thousand, both inclusive, to be stamped or printed on the face thereof with the same words:

And Whereas, the said Board of Directors of said first party by further resolutions resolved to make such supplementary mortgage as aforesaid, and also to provide therein for securing the payment of all said four thousand bonds, principal and interest as they respectively become due, and with interest at the rate of six per cent per annum on the first two thousand of said bonds and at five per cent on the next one thousand thereof, and at six per cent on the last one thousand thereof, unless it should be hereafter determined
345 to reduce the rate to five per cent thereon, upon all the property heretofore mortgaged or conveyed, and all property subsequently to the making of said mortgage or deed of trust acquired by the company, and such as may be hereafter acquired in said County of Douglas in such gold coin of the United States of the present standard of fineness:

Now Therefore, Know All Men By These Presents: That the

said The American Water Works Company, party of the first part, in pursuance of and by the authority of law, and in pursuance of the said proceedings and determinations of the Board of Directors heretofore set forth, in order to comply with the said covenant in said other mortgage or deed of trust mentioned, and to secure the payment of the principal and interest of all the bonds above described with pro rata equality, and to secure their payment, principal and interest, in gold coin of the United States of the present standard of fineness, and in consideration of the premises and other divers other good and valuable considerations it thereunto moving, the receipt whereof it hereby confessed and acknowledged, hath granted, bargained, sold, released, remised, enfeoffed, confirmed and conveyed, and by these presents doth grant bargain, sell, release, remise, enfeoff, confirm and convey, unto the said party of the second part, its successors and assigns, as such trustee, for the uses and purposes, and subject to the conditions and trusts in such mortgage or deed of trust and in this instrument expressed, all the privileges, franchises, easements, choses in action, estate, property, real and personal, effects and assets, in the said County of Douglas and State of Nebraska, which were conveyed by said mortgage or deed or trust and also all the privileges, franchises, easements, choses in action, estate, property, real and personal, effects, and assets which the said first party has acquired since the making of said mortgage or deed of trust in the said County of Douglas and State of Nebraska, or which it now has in said County of Douglas and State of Nebraska, whether or not the same be mentioned herein, among which are the following: that is to say: all and singular the following described property, lying and being in the City of Florence, County of Douglas, and State of Nebraska, known, described and designated as follows: Beginning at a point eighty-five (85) feet south of the northwest corner of Block one hundred and twenty-seven (127) of the City of Florence, as surveyed, platted and recorded, and running south seven hundred and ninety-five feet (795) to the right of way of the St. Paul, Minneapolis & Omaha railroad, thence in a southerly and easterly direction along such right of way (a three degree curve) to a point one thousand eight hundred and sixty-seven (867) 346 feet (end of curve); thence south two hundred and sixty-three (263) feet; thence east one hundred and five (105) feet; thence south two thousand three hundred and sixty-five (2365) feet to the right of way of the aforesaid St. Paul, Minneapolis & Omaha Railroad; thence in a southeasterly direction along said right of way seventy (70) feet; thence east nine hundred and thirty-five (935) feet to the southwest corner of Block numbered two hundred and sixty-three of the City of Florence, as surveyed, platted and recorded; thence north one thousand three hundred (1300) feet; thence east six hundred and sixty (660) feet; thence north one hundred and ninety-five (195) feet (more or less) to the west bank of the Missouri River. Thence in a northeasterly and northerly direction along the bank of said river until intersecting with the east and west line through the northwest corner or Block number one hundred and twenty-seven (127) (said line being the same as the north line of said Block and the south line of Bridge

street) of the City of Florence as surveyed, platted and recorded; thence west five hundred and ninety-five (595) feet (more or less) and thence in a southwesterly direction one hundred and seventy-five (175) feet to the point of beginning containing one hundred and twenty-five (125) acres of land (more or less).

Also lots one (1), two (2) four (4) five (5) and eight (8) Block No. 2, and the whole of Block number two hundred and sixty (260) all of the City of Florence, as surveyed, platted and recorded.

And also all the water works, mains, pipe machinery, stand pipe, chattels real, real estate, effects, choses in action, and assets of the first party in the City of South Omaha in said County of Douglas and State of Nebraska, including all water rentals, debts, dues, and demands, and choses in action of every kind and nature, both water rents from the said City of South Omaha in and by virtue of the contract by and between the said city of South Omaha and the said first party, and in and by virtue of a contract now existing or which may hereafter exist between the said city of South Omaha and the first party, or its assigns, which enures or may enure to the benefit of the said first party and its assigns, and all water rents from private consumers wheresoever situate, and all other income of whatsoever kind from any property of said company or source whatsoever, in said County of Douglas and State of Nebraska.

And the said party of the first part hereby makes, constitutes, and appoints the party of the second part, its successor or assigns, its true and lawful attorney, in fact, in its name and in its
347 place and stead to have, receive, sue for, demand, collect and receipt for all said debts, dues, demands, choses in action and water rents, by said above mentioned mortgage or deed of trust and by this instrument conveyed for the purposes of the trust in said mortgage or deed of trust and this instrument expressed, and this instrument shall further work and be an absolute assignment of said debts, dues, demands, choses in action and water rental, both those now existing or which may at any time hereafter exist or be derived in said County of Douglas, and of the property of the said first party in the said County of Douglas to the said second party as trustee to and for the uses and purposes expressed herein-after.

To Have And To Hold the said rights, privileges, demands, choses in action, property real or personal, estate choses in action, effects and assets, above conveyed to the said second party as trustee, its successors and assigns, in trust forever and subject to the following stipulations, covenants and agreements as trustee, that is to say:

First: This instrument is given for the purpose of securing the payment according to the provisions in the said mortgage and deed of trust contained of the principal and interest of all of the four thousand bonds therein mentioned, as the same severally and respectively hereafter become due, and according to the rate at which the same shall hereafter bear interest in gold coin of the United States of the present standard of fineness.

Second: This instrument is to be deemed, together with the said mortgage or deed of trust, one instrument.

Third: All the provisions in said mortgage or deed of trust contained for the possession by the first party previous to any default for defeasance and all the conditions agreements and covenants in said mortgage contained, are herein repeated and made part hereof, and all the provisions in said mortgage or deed of trust contained for the protection of the trustee and the limiting its liability are made a part of this instrument as if herein again specially written.

Fourth: The said first party, in consideration of the premises hereby covenants to and with the second party that it is well seized of all mortgaged property, and asserts that there is no incumbrance on its property, rights, choses in action, or assets hereby conveyed or intended so to be, except as mentioned in said mortgage or deed of trust, and that all said rights, privileges, easements, estates, property real and personal, effects and assets, hereby conveyed and mortgaged or intended so to be, against all lawful claims except

348 said mortgage given by the said City Water Works Company of Omaha to secure said four hundred bonds, it will forever warrant and defend, and in further consideration of the premises the said first party for the further assurance of the second party and the holders of said bonds, doth covenant, grant, bargain and agree to and with the second party that it will at any time in the future upon demand, at its own expense, execute, deliver, and record, all such further and other conveyances, assignments and supplementary mortgages of the rights, privileges, easements, estate, choses in action, property real or personal, effects and assets, now owned by it, whether covered by these presents or not, situate in the County of Douglas and the state of Nebraska, and of any right, privilege, easement, estate, chose in action, property real and personal, effects and assets, which it may own at any time hereafter in said County of Douglas and state of Nebraska, and in any wise connected with the property mortgaged, and the second party may demand; to subject the same to the lien of said mortgage or deed of trust hereinbefore mentioned, and the provisions of this instrument, and such further and other conveyances, assignments, and supplementary mortgages shall be deemed a part of said mortgage or deed of trust heretofore mentioned, and this instrument, and form together one security for the payment of the debt evidenced by said bonds and coupons in gold coin of the United States of the present standard of fineness.

The recitals herein contained are made on behalf of the party of first part, and the party of the second part assumes no responsibility as to the correctness of any statement herein contained.

And Whereas, by reason of distance and lapse of time or other accidents the date of the actual execution of this indenture and mortgage or deed of trust by the various parties thereunto may be prior to or subsequent to the day on which it bears date, now it is expressed, agreed and declared that this indenture and mortgage or deed of trust shall be dated the 16th day of January, A. D. 1889, and shall be valid and effectual as if executed on the day of the date thereof.

In Witness Whereof the said The American Water Works Company hath caused these presents to be executed by its President and

Secretary, and sealed by its Corporate seal, this 16th day of January, A. D. 1889.

[L. S.]

THE AMERICAN WATER WORKS
COMPANY,

By W. A. UNDERWOOD, *President.*

By W. H. HALL, *Secretary.*

349 STATE OF NEBRASKA,
Douglas County,

On this 5th day of February, A. D. 1889, personally came before me, a Notary Public in and for said County W. H. Hall, personally known to me to be the Secretary and Assistant Manager of The American Water Works Company, and he acknowledged that the said The American Water Works Company had executed the foregoing instrument, and that the same was the free and voluntary act and deed of said The American Water Works Company.

Witness my hand and official seal the day and year above written.

[L. S.]

FRANK B. RODEFER,

Notary Public.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

On this 16th day of March, A. D. 1889, personally came before me, a Notary Public in and for said County, William A. Underwood, personally known to me to be the President of the American Water Works Company, and he acknowledged that the said The American Water Works Company had executed the foregoing instrument, by him as President and that the same was the free and voluntary act and deed of said The American Water Works Company.

Witness my hand and official seal the day and year above written.

[L. S.]

LLOYD BRIGGS,

Notary Public.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

CLERK'S OFFICE OF SUPERIOR COURT.

I, Jos. A. Willard, of Boston, in said County, duly elected, qualified and sworn as clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston, in said County, said Court being a Court of record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby, in the performance of my duty as said Clerk, certify and attest that Lloyd Briggs before whom the annexed affidavit, proof or acknowledgement was taken or subscribed is a Notary Public for and within said County, duly appointed, commissioned, qualified, sworn and authorized by the laws of the said Commonwealth to act as such: and also duly authorized by the laws of said Commonwealth to take affidavits and certify proofs and acknowledgments of deeds of conveyances of lands, tenements and hereditaments, lying and being in said Commonwealth; that he was at the time of

taking the affidavit, proof or acknowledgment hereto annexed, such Notary Public; that due faith and credit are and ought to be given to his official acts; that I am well acquainted with his signature and handwriting, and I verily believe that the signature to the said affidavit, proof or acknowledgment is genuine, and further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said Court, at Boston, in said County and Commonwealth, this sixteenth day of March, A. D. 1889.

[L. s.]

JOS. A. WILLARD, *Clerk.*

The Farmers' Loan & Trust Company of the City of New York the party of the second part in the within instrument mentioned, hereby accepts the trusts therein mentioned and conferred upon it, according to the terms of said instrument and the original mortgage, to which this is a supplement.

In Witness Whereof, the said The Farmers' Loan & Trust Company hath caused this instrument to be executed by its President and Secretary, and to be sealed with its corporate seal, on the day and year first in said instrument written.

[L. s.]

THE FARMERS' LOAN &
TRUST COMPANY.

R. G. ROLSTON, *President.*

Attest:

WM. H. LEUPP, *Secy.*

STATE OF NEW YORK,

City and County of New York, ss:

On this 19th day of March, A. D. 1889, personally came before me, a Notary Public in the aforesaid county, Rosewell G. Rolston and William H. Leupp, personally known to me to be the President and Secretary of said The Farmers' Loan & Trust Company of the City of New York, the maker of the foregoing acceptance of trust, and acknowledged that the said The Farmers' Loan & Trust Company had executed the foregoing instrument of acceptance by them as such President and Secretary, and that such instrument of acceptance was the free and voluntary act and deed of said The Farmers' Loan & Trust Company.

Witness my hand and official seal the day and year above written.

[L. s.]

C. A. SEARLS,

Notary Public, 206, New York Co.

351 STATE OF NEW YORK,

City and County of New York, ss:

I, Edward F. Reilley, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of Record, Do Hereby Certify that C. A. Searls, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed Instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Notary

Public in and for the City and County of New York, dwelling in said City, [commission] and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 19th day of March, 1889.

[L. s.]

EDWARD F. REILLEY, *Clerk.*

Endorsed: Filed Oct. 9, 1893. Elmer D. Frank, *Clerk.*

United States Circuit Court, District of Nebraska.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,

vs.

THE AMERICAN WATER WORKS COMPANY (of Illinois), THE AMERICAN WATER WORKS COMPANY (of New Jersey), E. Hyde Rust as Suspended Receiver, and Alonzo B. Hunt, Temporary Receiver, Respondents.

Answer of The American Water Works Company, of Illinois, and The American Water Works Company, of New Jersey.

The joint and several answer of the American Water Works Company, a corporation organized and existing under the laws of the state of Illinois, and a citizen of the state of Illinois, and having its principal office and place of abode in the City of Chicago in said State of Illinois, and of the American Water Works Company, a corporation organized and existing under the laws of the state of New Jersey and a citizen of the state of New Jersey and having its principal office and place of abode in the city of New Jersey in said State of New Jersey, to the bill of complaint of the Farmers' Loan and Trust Company, a corporation duly created by and under the laws of the state of New York and a citizen of the state of New York, having its principal offices and place of abode in the city of New York, complainant.

352 These defendants now and at all times hereafter saving and reserving to themselves all benefit and right of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainants' said bill of complaint contained for their joint and several answer thereto or of so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants for answer say:

1. That this court has no jurisdiction to hear and determine the matters involved in the complainants' bill of complaint, and that the attempted service of process upon these defendants was and is without authority of law and void for that the complainant company is a citizen and resident of the state of New York and that neither of these answering defendants are citizens or residents of the State

of Nebraska, nor of the District of Nebraska within which this suit is brought. And in this connection further say that the defendant E. Hyde Rust, described in the bill of complaint as suspended receiver, is a citizen and resident of the state of New Jersey and that he has been suspended and removed from his said trust as receiver, and is not in possession of any of the property in controversy and is neither a proper or necessary party defendant; and that Alonzo B. Hunt described as Temporary Receiver, is only an officer and representative of this Court and is not a necessary or proper party to this proceeding; and that the controversy herein is one in which neither the complainant nor defendants are citizens or residents of the District in which the suit is brought and that the matters in controversy in this suit are not auxiliary to nor in any manner dependent upon or connected with any prior proceeding in this court relating to the property in controversy. All which said matters and things have heretofore been presented to this court in the form of a Plea to the jurisdiction of this court to hear and determine this case, and which said plea having been overruled by the Court and these defendants then desiring and still desiring to reserve and preserve to each of them, all manner of benefit and exception to the said order of Court overruling said plea to the jurisdiction, make this their said answer under protest and obedient to the order of the Court directing that they answer to the merits, not meaning or intending hereby to waive any or singular of the objections to the jurisdiction of the Court hereinbefore set forth.

2. These defendants jointly and severally represent that prior to the 20th day of May, 1880, the city of Omaha, a municipality of the state of Nebraska, desiring to construct or to cause to
353 be constructed a system of water works in the City of Omaha, employed one J. D. Cook to report to the City Council of the city of Omaha a plan for the construction of a system of water works in the said city, and that said J. D. Cook being a skilled hydraulic engineer did report to the said City Council of the city of Omaha a plan for the construction of such a system of water works, said report being found printed and published by the City of Omaha in a book entitled "Charter and Ordinances of the City of Omaha" on pages 584-6, inclusive.

That said report was filed in the office of the City Clerk of the city of Omaha on the 25th day of May, 1880, and was afterwards approved by the City Council of the city of Omaha on the 18th day of June, 1880, and is set forth at large in the said book entitled "Charter and Ordinances of the City of Omaha" at pages 576-593 inclusive.

That afterwards on the 31 day of May, 1880, the said J. D. Cook filed an appendix to his said report, which said appendix may be found on pages 594-595 of said book above referred to, and which said appendix was approved by the City Council on the 8th day of June, 1880.

3. These answering defendants further say that afterwards on the 11th day of June, 1880, the City Council of the City of Omaha passed an ordinance which was on the same day approved by the

Mayor of the said city, being Ordinance No. 423, entitled "An Ordinance to authorize, procure and construct a system of Water Works in the City of Omaha, Nebraska." In Section 1 of said ordinance it is provided that any person, company, corporation or association who shall erect, construct and maintain water works of the magnitude and character therein described and as more fully and at large appears in the said report and appendix of the said J. D. Cook for the purpose of supplying the said city and the citizens and inhabitants thereof with water for domestic, mechanical and fire purposes shall have the right of way along, upon and under the public streets of the said city for water mains, pipes and fire hydrants during the time such person, company, corporation or association shall maintain and operate such system of water works, but upon the terms and conditions in the ordinance described.

Section 3 of said ordinance sets forth the pumping capacity of such system of water works, and also the capacity of the water reservoirs to be constructed in connection therewith.

Section 4 of said ordinance provides the size, length and capacity of the water mains, subject to inspection and approval by the city of Omaha.

Section 6 of said ordinance provides for the location and placing of fire hydrants upon and along the streets of said city for the purpose of fire protection, subject to such changes and modifications as the City Council of said City shall direct as to location.

Section 7 of the ordinance provides for the furnishing of a supply of water adequate to the wants and use of the public and for certain sanitary purposes therein set forth.

Section 10 of said ordinance fixes a maximum charge to be made for the consumption of water for the various purposes and uses therein set forth.

4. That afterward on the 14th day of July, 1880, the City Council of the city of Omaha passed an ordinance No. 430 which was approved by the Mayor July 15th, 1880, making certain amendments to said ordinance No. 423 hereinbefore mentioned.

In Section 12 of said ordinance No. 430 it is provided that the City Clerk of the City of Omaha should advertise for sealed proposals for furnishing the city of Omaha with water for fire protection and for public use for the term of twenty-five (25) years, according to the provisions of said ordinance, and further provides that the bids received shall specify the price per hydrant per year to be paid therefor by the city of Omaha as in said ordinances and in said report of J. D. Cook provided, and that said bids should also be accompanied by an acceptance of the provisions of said ordinances in the event the contract for the supply of water for the public, and fire protection, should be awarded.

5. In compliance with said advertisement for sealed proposals one Sidney E. Locke made a bid for the construction of a system of water works, which was in terms as follows:

*"Proposal for the Construction and Maintenance of Water Works
in the City of Omaha, State of Nebraska.*

"To the Hon. the City Council of the City of Omaha:

The undersigned hereby proposes to erect, construct and maintain water works in the City of Omaha, for furnishing the City of Omaha, Nebraska, with water for fire protection and public use, for the term of twenty-five (25) years from the time of the completion of said works as fixed by an Ordinance No. 423, passed and adopted by your honorable body June 11th, 1880, and another Ordinance amendatory thereof No. 430, passed and adopted, July 14th, 1880, and as required by the details and specifications in said Ordinances set forth and referred to.

The undersigned further and in addition to the foregoing, and in further compliance with the requirements and specifications in said ordinance set forth or referred to, proposes to so erect or construct said water works as to furnish water through not less than two hundred and fifty hydrants as specified, and to so furnish said water so as above stated at a rate of eighty-four (84) dollars per year per hydrant, and further propose to erect and furnish water through, such intermediate hydrants, in addition to the number first above given, as may by the provisions of said ordinances and in accordance with the report of J. D. Cook therein referred to, be further called for or required, at a rate of ten dollars (\$10.00) per year per hydrant.

The undersigned further proposes, in case hydrants in addition to the number and quantity hereinbefore specified shall during the time provided for the maintenance of said water works, be required on new mains, to erect, construct, maintain and furnish water through the same at the time or times and *and* in the manner by said ordinance or the report of said Cook provided at a rate of sixty dollars (\$60.00) per year per hydrant.

The undersigned further proposes and states that the water so by the proposed works to be furnished shall be for the uses, of the kind and quantity, and at rates not to exceed those by said ordinance fixed, determined or referred to, except as specified herein in connection with hydrant use.

This proposal is hereby accompanied by a bond duly executed, in the sum of \$25,000.00 dollars as required.

The conditions and specifications of said ordinance are hereby accepted in case award of contract for said works is made to the person submitting this proposal.

S. E. LOCKE.

Dated Omaha, Neb., July 20th, 1880.

Which said proposal was accepted by the City of Omaha, and afterwards on the 20th day of July, 1880, a written contract was entered into between the said Sidney E. Locke and the City of Omaha for the construction of a system of Water Works, which said contract made reference to the said report of the said J. D. Cook,

and to said Ordinances No. 423 and 430, and to the advertisement for sealed bids which was made by the City Clerk pursuant to said Ordinances, which said contract was in words and figures as follows:

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"Water Works Contract.

This contract made and entered into at Omaha, Douglas County, Nebraska, this 20th day of July, A. D. 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part Witnesseth:

Whereas, the City of Omaha did on the 11th day of June A. D. 1880, pass its certain ordinance No. 423, entitled 'An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska,' and did on the 14th day of July, A. D. 1880, pass its certain ordinance No. 430, entitled 'An ordinance to amend sections (3), six (6) and twelve (12) of Ordinance 423 entitled 'An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, state of Nebraska' and

Whereas, the City Council of said city of Omaha did receive from J. D. Cook, engineer, on the 25th day of May, A. D. 1880, the report and on the 31st day of May, A. D. 1880, the appendix to said report referred to in Section one (1) of said Ordinance No. 423, and did on the 8th day of June, 1880, adopt and approve said report and appendix; and

Whereas, the said City of Omaha did in compliance with the provisions of the said ordinance, advertise from the 16th day of July, A. D. 1880 for sealed proposals for furnishing the city of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the time of the completion of this work, through two hundred and fifty hydrants, of the character and locations mentioned in the Ordinances Nos. 423 and 430, and said report of J. D. Cook, engineer, as approved; and

Whereas, the said City Council of the City of Omaha did, on said 20th day of July, A. D. 1880, accept said proposal of said Sidney E. Locke, did award said contract to him and did order that the said contract should be formally made by the Mayor of said City of Omaha, acting in its behalf.

Therefore it is hereby contracted and agreed by and between said parties as follows:

In compliance with said ordinances Nos. 423 and 430 in said report of the said J. D. Cook, engineer, and the appendix thereto as approved by the said city council, said advertisement, proposal and accepting thereof and awarding of said contract (all of which are herein recited as being understood to be parts of this contract) the said Sidney E. Locke, party of the second part, contracts and
357 agrees with said party of the first part, to erect, construct and maintain said water works in the city of Omaha and to furnish the city of Omaha, party of the first part, with water for fire protection and public use for the term of twenty-five years from the

time of the completion of said works, as fixed by said ordinances Nos. 423 and 430, and by said report of said J. D. Cook, as approved by said City Council. Said party of the second part further agrees to furnish said water through not less than two hundred and fifty hydrants of the character and as located and placed in said ordinances and approved report, at the rate of eighty four dollars (\$84) per year per hydrant, and to furnish said water through such intermediate hydrants, in addition to the number first given, as may by the provisions of said ordinances and in accordance with said approved report be further called for or required, at the rate of ten (\$10) dollars per year per hydrant, and in case hydrants in addition to the number and quantity hereinbefore specified shall, during the said term of twenty five years, be required on new mains, to erect, construct and maintain said new mains at the rate of sixty (\$60) dollars per year per hydrant.

And in consideration of the said agreement of the said Sidney E. Locke, the said party of the first part agrees to pay for said hydrant water supply at the rates per hydrant per year above specified. The said payment to be made by warrants drawn upon the first day of July and the first day of January of each year and every year of said term upon the treasury of said city; the payment for the water from each hydrant to commence when it is actually ready for use and the City Clerk notified thereof, and the pay thereof shall cease during any time that said hydrant shall be out of repair or unfit for use.

This contract shall take force and effect only upon its approval by the City Council of the City of Omaha.

In testimony whereof we have hereunto set our hands at Omaha, Nebraska, the date first above written.

(Signed)

THE CITY OF OMAHA,
By C. S. CHASE, *Mayor*.
SIDNEY E. LOCKE.

Signed in the presence of:

CHAS. F. MANDERSON.
C. J. WESTERDAHL.

Approved by the City Council, July 20, 1880.

(Signed)

JAMES E. BOYD,
Pres't City Council.

Attest: J. F. McCARTNEY, *City Clerk*.

[Seal of City of Omaha.]

358 That afterwards on the 26th day of July, 1880, the said Sidney E. Locke for a good and valuable consideration, did assign, sell, transfer and set over unto "The City Water Works Company of Omaha, a corporation organized under and existing under and by virtue of the laws of the State of Nebraska said contract for the construction, operation, control and maintenance of Water Works in the City of Omaha, with all the rights, privileges, immunities, profits, duties and obligations that he, the said Sidney E.

Locke, did have thereunder, to the same extent in each and every part as if said contract had been made with the City Water Works Company of Omaha originally, and not with said Sidney E. Locke."

6. That afterward the American Water Works Company of Illinois, a corporation created and organized under and by virtue of the laws of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska, pretended to purchase of and from the said City Water Works Company of Omaha the said water works plant in the City of Omaha, including the real estate connected with the operation of the same, by means of which the City of Omaha and its inhabitants were and are supplied with water for fire and other purposes and thereby pretended to assume and must be held to assume and to be bound by all the terms and conditions of said contract between the said city of Omaha and the said Sidney E. Locke, and to maintain and operate said system of water works for the use and benefit of the city of Omaha in the same manner and to the same extent as the said Sidney E. Locke by his said contract was bounden to do.

That it was well known and understood between all the parties thereto that the chief object of the city of Omaha in taking the respective steps aforesaid looking towards the construction of said system of water works, was to supply the city of Omaha with water for fire protection and for public and domestic use in the same manner and to a like extent as if the said city of Omaha had in its own right and at its own expense constructed and owned said system of water works, and all of which facts the complainant company and all and singular of the owners and holders of the series of bonds in the bill of complaint set forth were bounden to know.

7. That the defendant the American Water Works Company of Illinois was not by law duly authorized on or about the first day of July, 1887, or at any other time to make and execute the mortgage in the bill of complaint described upon the said system of water works and was not by law duly authorized to secure the said issue or series of bonds in the bill of complaint described by any mortgage or deed of trust upon the said system of water works in the City of Omaha.

That the American Water Works Company of Illinois, the mortgagor company herein, was not under and by virtue of its articles of incorporation authorized or empowered to make or execute said mortgage upon the said water plant nor was said company authorized thereunto under and by virtue of the laws of the state of Illinois nor under nor by virtue of the laws of the state of Nebraska where said property is situate, to make and execute said mortgage upon said property, and all of which facts the complainant company as well as all and singular of the owners and holders of said bonds must be held bounden to at all times have known.

That said franchise, privilege and easement granted by the City of Omaha to the said Sidney E. Locke was a personal privilege granted by the city of Omaha to be used only for the use and benefit of the city of Omaha, and subject to its control, and so the defendant companies must be held to have accepted the same, and that no privilege,

right of authority was ever granted or intended to be granted by the city of Omaha to the said Sidney E. Locke or his assigns to mortgage, encumber or otherwise dispose of said franchise, or of any of the property constituting a part of said system of water works, or incidental or necessary thereto pertaining to the maintenance and operation of said system of water works, or to do any other or manner of thing that would tend to take away or deprive them of their power to maintain and operate said system of water works for the use and benefit of the city of Omaha, as under said ordinances and said contract with Sidney E. Locke was and is provided.

These defendants further answering say that all the property real and personal, as well also the privileges, franchises and easements intended to be conveyed by said mortgage, were and are necessary to the use and enjoyment of the person or company operating said water plant, and were and are necessary to such company to enable it to maintain said system of water works and to supply the said city of Omaha with water for domestic uses and for fire protection, all of which matters and things were well known to the complainant company at the time of the pretended execution of said mortgage and were also so known to the persons becoming the owners and holders of the bonds pretended to be secured thereby.

That it was well known to the complainant company as well as to the said bond holders who purchased the bonds pretended to be secured by said mortgage, that to enforce said mortgage 360 by decree of foreclosure and sale of said property or by the taking possession of said property by the said Trustee under and by virtue of said mortgage, would deprive the defendant companies of the power to maintain and operate said water plant, and would render said defendant companies powerless to fulfill the obligations they assumed to the city of Omaha and would thereby destroy and take from the city of Omaha the right which it had secured to itself by said contract with Sidney E. Locke, to have its inhabitants supplied with water for domestic use, and the municipality to be supplied with water for fire protection and other purposes. Whereby and by reason whereof said companies were without authority of law to make said mortgages and the same were and are, illegal and void.

These defendants further answering say that by Section 11 of said ordinance 423, which is made a part of said contract, with the water company, it is provided:

"In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident), all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of just compensation

therefor, to be ascertained as provided in section 14 of this ordinance; Provided, that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

That under and by virtue of the provisions of said section the City of Omaha had and has a material interest in said property of which it could not and can not be divested by either a mortgage or sale under foreclosure, and further that the making of said trust deed was and is in violation of the provisions of said section, and that a foreclosure of said mortgage and sale of the water plant would deprive the defendant companies of the power of complying with its duties and obligations to the city of Omaha, which would result in a forfeiture of said property and all the rights, privileges and immunities granted to the defendant companies, and re-vest the ownership, possession, control and management of said system of water works, in the city of Omaha and by reason whereof said mortgages were and are, illegal and void, and were and are against public policy.

361 8. These defendants further answering say that while the said pretended mortgage purports and pretends to cover all the property and assets of every kind and nature of the mortgagor company, and also its privileges, franchises, easements and choses in action no such extensive authority was ever undertaken or pretended to be granted by the said mortgagor company to its said officers who assumed to execute the said mortgage, and that the said J. R. Custer, assuming to act as President of the said Mortgagor Company, and the said Joseph A. Griffin, assuming to act as the Secretary of said mortgagor company in the execution of said mortgage, acted without authority from said Company in the making and the executing of said mortgage in this, that they were never authorized to execute this particular instrument; that all the authority possessed by the said Custer as President and the said Griffin as Secretary was such powers and authority as were vested in them as such officers under the articles of incorporation and the by-laws of the mortgagor company, and by the minutes of the proceedings of its Board of Directors and that nowhere in their said articles of incorporation, or by-laws, or minutes of proceedings of its Board of Directors was there authority granted to the said persons to execute the instrument in the bill of complaint set out.

Defendants further say that each and singular of the averments hereinbefore set forth touching the infirmities existing in said mortgage equally apply in truth and in fact to the said supplemental mortgage in the bill of complaint described.

9. These defendants further answering deny that default was made by the mortgagor company in the payment of coupons, as set forth in paragraph twenty (20) of the bill of complaint, and in that connection further say that the coupons maturing January 1st, 1892, amounting to the sum of \$98,000.00 and of which sum only \$41,279.00 are outstanding and of this sum \$8,000 are owned and held by the Omaha National Bank, and were purchased and are held by the Omaha National Bank for the purpose of avoiding a forfeiture under the said mortgage, and that of said coupons \$18,275 are

owned by the United Water Works Company, and are held by it for the purpose of avoiding a forfeiture under said mortgage, thus leaving but a sum of \$15,000 of unpaid coupons maturing January 1st, 1892.

Of the \$98,000 of coupons maturing July 1st, 1892, there are only \$48,000 outstanding, and of which amount \$45,000 are 362 held and owned by persons not desiring either a default or a foreclosure under said mortgage.

Of the coupons maturing January 1st, 1893, only \$22,500 are outstanding, and of which amount \$21,290 or nearly the whole amount, are controlled by C. H. Venner, and who is likewise opposed to the said foreclosure.

Of the coupons maturing July 1st, 1893, \$32,000 have been purchased and are now controlled by persons who have waived default and are opposed to foreclosure.

That the whole amount of outstanding unpaid coupons is \$209,775 prior to January 1st, 1894, and that the greater portion of which are held by persons who are opposed to a foreclosure of said mortgage and have not desired any default to be declared thereon, and that the whole amount of overdue coupons controlled by the Farmers Loan & Trust Company, complainant, is less than one-half of all the over-due coupons outstanding.

In this connection these defendants further answering say that the complainant company as trustee has never made any demand upon the mortgagor company for the payment of any interest coupons and that no demand has been made upon said trustee company by the holders of a majority of said coupons to declare a forfeiture or to foreclose said mortgage. In this connection these defendants further answering say that the said water plant at Omaha has at all times been earning sufficient money to pay its operating expenses and accruing interest and would have paid all of said coupons upon maturity thereof if it had been permitted to manage its said property, and in this connection further say that there is sufficient money in the hands of this court belonging to the defendant companies to pay and take up all the coupons maturing before the first of January, 1894, which are in the hands or under the control of the complainant company, and sufficient to pay and take up the coupons held by persons now insisting upon a foreclosure.

10. These defendants further answering say that the defendant company having dissensions in its Board of Directors, certain persons, being desirous of obtaining control of the property caused to be instituted certain legal proceedings in this court and also in the court of Chancery of the state of New Jersey, for the purpose of preventing the application of the earnings of the water company to the payment of said coupons, with the ultimate aim of bringing about a default in the payment of such coupons so that a foreclosure might

363 be brought about, and by means of such foreclosure to enable certain of the stockholders, and certain of the holders of the bonds, to obtain a title to and possession of the water plant to the exclusion of a large number of other stockholders and bond

holders equally interested in the preservation of the water plant and equally interested in the prevention of a foreclosure.

11. These defendants further say that as a part of said scheme to bring about the present attempted foreclosure, a committee was organized by certain dissatisfied stockholders and bondholders, to obtain the control of certain of the bonds and coupons with a view to this foreclosure proceeding. That said committee was and is composed of seven persons, of whom Rosewell G. Ralston, the president of the complainant company, is one. That said committee devised and issued and caused to be circulated among the bondholders certain circulars requesting them to surrender their bonds and coupons to said committee and requiring the owners and holders of said bonds and coupons to submit to an assessment of a considerable sum of money to be paid into the hands of said committee, under the pretense or claim of raising a fund to pay the expense of protecting the interests of said bondholders, and which said circulars contained a further innuendo or threat to the effect that if said bondholders submitted their bonds and coupons to said committee, or to the complainant company that they would forfeit their rights under the said mortgage and that under and by virtue of said proceedings, innuendoes and threats the complainant company was enabled to obtain possession or control of certain of said bonds and certain of said unpaid coupons to the limited amount hereinbefore set forth, and that the complainant company when called upon by certain of the stockholders and bondholders to disclose what persons, if any, being bondholders, had requested of the complainant company to declare a default and to bring a foreclosure proceeding, declined to make such disclosure of what persons if any had so requested said default or said foreclosure. Wherefore defendants charge upon information and belief that the declaration of default, if any has been made by the complainant company, and said determination of said complainant company to file its bill of foreclosure, has not been done in the interest of the bondholders, but has been done in the interest and at the solicitation of the said committee above referred to, and which was organized as these defendants are informed and believe to secure a personal advantage to themselves or those represented by them under their procurement as aforesaid, and to the disadvantage and against the wish of a majority of the holders of the bonds and coupons. Wherefore the defendants charge that this foreclosure proceeding is unjust and inequitable, and is contrary to and unwarranted by the provisions and stipulations in the said mortgages in that behalf.

12. These defendants further answering, deny that E. Hyde Rust is in possession of any of the property or franchises covered by the said mortgage, but upon the contrary aver that under and by virtue of an order issued out of this Court said E. Hyde Rust has been removed as receiver of any of said property, and that said E. Hyde Rust has not been exercising as such receiver any control over said property for a long time prior to the filing of the bill of complaint herein. And these defendants deny that the said E. Hyde Rust has any right to the possession or control of any part of the property covered by

said mortgage under and by virtue of any order whatsoever issuing out of said Court of Chancery in the State of New Jersey or under and by virtue of any order issued out of this court in the suit of the Denver City Water Works Company, et al., vs. The American Water Works Company, et al., referred to in any of the several divisions of paragraph twenty (20) of the bill of complaint.

13. These defendants further answering say that if they had been permitted and were now permitted without the interference of the complainant company and of said committee in the interest of whom the complainant company is acting, to receive, use and apply the moneys on hand and the revenues and receipts from said water plant to the payment and discharge of maturing coupons, these defendants could at all times and could now pay, discharge and take up all outstanding coupons and preserve, maintain and operate said water plant for the use and benefit of the city of Omaha as in said contract between the city of Omaha and Sidney E. Locke is provided, and further say that such a preservation of the said water plant by the defendant companies would best subserve the interests of all concerned. Wherefore defendants charge and aver that such orders and decrees in that behalf should be entered herein as would provide for the taking up and discharge of said coupons, and as should preserve the said water plant to the defendant companies, and in that behalf that the prayer for the foreclosure of the said mortgage should be denied.

14. And the said defendants further answering deny that the said complainant is entitled to the relief or any part thereof in the said complaint demanded. And these defendants pray the same advantage of this their joint and several answer as if they had severally pleaded or demurred to the said bill of complaint. And these
365 defendants pray leave to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

THE AMERICAN WATER WORKS COMPANY
(OF ILLINOIS) AND
THE AMERICAN WATER WORKS COMPANY
(OF NEW JERSEY),

By JNO. L. WEBSTER, *Their Solicitor.*

JNO. L. WEBSTER,
A. J. LUNT,
Of Counsel.

Endorsed: Filed Apr. 30, 1894. Elmer D. Frank, Clerk.

In the Circuit Court of the United States, District of Nebraska.

FARMERS' LOAN & TRUST COMPANY, Complainant,
vs.

THE AMERICAN WATER WORKS COMPANY (OF ILLINOIS), THE
American Water Works Company (of New Jersey), E. Hyde Rust,
as Suspended Receiver, and Alonzo B. Hunt, Temporary Re-
ceiver, Respondents.

Now comes the American Water Works Company of Illinois,
and the American Water Works Company of New Jersey, and for

amendment to their answer hereinbefore filed, leave of Court having been granted thereunto aver:

1. That said defendant the American Water Works Company of Illinois was not by law authorized on the first day of July, 1887, or in January, 1889, or at any other time to make or execute the mortgages or either of them in said bill of complaint described upon said system of water works, and was not by law authorized to secure the said alleged issue or series of bonds in said bill of complaint described by any mortgage or deed of trust upon said system of water works in the city of Omaha; that said Company was not under and by virtue of its articles of incorporation authorized or empowered to make or execute said mortgage upon said plant or any part thereof nor was said company authorized thereunder or by virtue of the laws of the State of Illinois, nor under and by virtue of the laws of the State of Nebraska where said property was situated, to execute or make said mortgage upon said property, and said mortgage was an effort to create an indebtedness far in excess of the limit authorized by law; that is, in excess of two-thirds of the capital stock of said mortgagor company; that said mortgagor company's capital stock was and is only six hundred thousand dollars (\$600,000), and it had 366 no power or authority to create or incur a liability in excess of four hundred thousand dollars (\$400,000), and that there already existed a prior mortgage upon said property of four hundred thousand dollars (\$400,000) which was the full limit of the Company's authority to become indebted.

2. That the said stockholders of said alleged mortgagor company never authorized said mortgage to be given on all the property therein described, and particularly did said stockholders not authorize a mortgage of said contract and franchise from the city of Omaha, and its said directors did not so authorize, and further aver that said Illinois Company could not in any event lawfully make a mortgage upon said property, especially the said contract with the City of Omaha, except upon the conditions and terms prescribed by the said city of Omaha which never agreed thereto, and except upon the further condition and terms that the said the American Water Works Company of Illinois and the said complainants herein should maintain and operate the said water works plant, and provide for the same and all thereof being kept a going concern for the entire time of the said contract with the said city of Omaha, and except upon the provision and condition that the said water works company and the said complainant and the several holders of the bonds issued under said alleged mortgage should agree and provide for the furnishing of the necessary machinery, material, pipe, engines, hydrants and other necessary apparatus to enable said water works plant to be maintained and operated, and to keep and hold good its said franchises and contract with the said City of Omaha. That said franchise and privileges granted to the said Sidney E. Locke by the city of Omaha was a personal privilege granted to the said Sidney E. Locke for the use and benefit of the said city of Omaha and its inhabitants and subject to its control and so and under such terms and conditions and subject to such charges the

said complainant accepted the said mortgage on said plant and the said city of Omaha never did, at any time, agree to the making of said mortgages, or the encumbering of said property or franchises, or to the assignment of said franchises, of all of which facts the bondholders and trustee had notice.

3. That the defendant the American Water Works Company of Illinois, a corporation created and organized under and by virtue of the laws of the State of Illinois, but not incorporated under and by virtue of the laws of the State of Nebraska did not and has not filed with the secretary of State of the state of Nebraska, copies of its articles of incorporation as required by law in that behalf, and hence was not authorized to do or transact any business in the State of Nebraska.

367 4. That the organization of the American Water Works

Company of Illinois was illegal and that the same was promoted and organized as a scheme or device to evade the provision and policy of the laws of the State of Nebraska, and that the organization of said company was promoted by the persons who thus owned the stock of the said Water Works Company of Omaha, a Nebraska corporation as set forth in the original answer, and that the object and purpose of said new corporation under the laws of Illinois was to transfer to it the water plant belonging to the said Nebraska corporation to the end that there might be conferred upon the new corporation organized under the laws of the state of Illinois enlarged and greater powers than could be exercised by it under the laws of the State of Nebraska and that none of the persons having any real or substantial interests in the said Illinois corporation were either residents or citizens of the State of Illinois, and of all which facts the complainant herein and the bondholders by the terms of the said mortgage were bound to have had notice, and did in fact have notice and that said bonds were not sold and delivered to bona fide holder for value.

5. That the Farmers' Loan & Trust Company, complainant herein at the time when it pretended to accept deeds of trust under said mortgage was not authorized or empowered so to do in that said mortgagor company was a corporation organized under the laws of the state of Illinois, and purported to execute its said mortgage under the laws of the State of Illinois, and that the complainant company had not and has not complied with the laws of the state of Illinois, to-wit: an Act entitled "An Act to provide for and regulate the administration of Trusts by Trusts Companies" approved June 15th, 1887, and had not more particularly complied with Section Six of said act which requires of such Trust Companies before accepting any appointment as Trustee to deposit with the Auditor of Public Accounts of the State of Illinois the sum of two hundred thousand dollars (\$200,000) in bonds of the United States or of Illinois, or in mortgages on Illinois real estate, and that the said complainant company had not received any certificate of authority from the Auditor of Public Accounts of the State of Illinois reciting that said complainant company had complied with the requirements of said Act in respect to said deposit, and was thereby prohibited from accepting said trust, and by reason of the premises aforesaid

the said complainant company was not authorized and is not now authorized to act in the capacity of Trustee under said mortgage nor to maintain this Bill to foreclose the said mortgage, and of all which facts the bondholders were bounden in law to take notice.

368 AMERICAN WATER WORKS CO. (OF ILL.) AND
AMERICAN WATER WORKS COMPANY (OF
NEW JERSEY),

By JNO. L. WEBSTER, *Their Solicitor.*

JNO. L. WEBSTER,
Of Counsel.

Endorsed: Filed Jan. 2, 1895. Elmer D. Frank, Clerk.

Water Works.

Engineer Cook's Report.

To the Honorable City Council, Omaha, Nebraska.

GENTLEMEN: As instructed by your special committee, I have had under consideration the subject of water supply for your city, and herewith respectfully submit the result, with such suggestions and recommendations as are deemed most conducive to your present and prospective needs.

The unusual width of your streets, and their near proximity to each other, necessitates a comparatively unusual aggregate length of pipe distribution. Many streets seem so nearly equal in importance, demanding equal protection and supply, that any discrimination is manifestly unjust. Population as compared with territorial area tends to a still further complication of the problem.

While it is an important desideratum to supply and protect to the greatest attainable extent your more sparsely settled suburban district, it may not be proper to overlook the equity of conferring the greatest benefits upon the greatest number, by ignoring all estimates and comparisons of cost with resulting benefits.

In adverting to these questions I deem it unimportant whether the works are to be constructed and owned by the city or by a private company, under a franchise contemplating a stipulated annuity to be paid by the city. The same considerations, such as safety, efficiency and capacity are equally pertinent in either case. With equal benefits, public and private, it matters little to the taxpayer whether the city pays interest on bonded indebtedness or an equivalent amount annually to a private company. The city, however, is directly interested in having such works as will adequately meet all ordinary public exigencies and private needs—in immunity from unreliable machinery—from frequent and extensive repairs—
369 from inefficiency in pipe and hydrant distribution and from avoidable interruptions of every nature.

Underlying the success of a public water supply, especially when it is contemplated to depend upon direct hydrant pressure for fire service, is the necessity for a judicious pipe distribution. The trans-

mission of pressure to points remote from the source of power and its steady maintenance while discharging sufficient water to subdue conflagrations, cannot be safely accomplished excepting through a pipe distribution of adequate diameter and arrangement. Gravity pressure is wholly dependent upon the altitude of reservoir or fountain head, and the loss by friction irreparable, and when overcome by direct pumping an excessive strain is frequently imparted to the distribution, endangering service pipes, house plumbing, etc. So that in either case a pipe distribution of liberal capacity is the surest, if not the only method, of safely meeting such variable service.

Entire dependence upon hydrants for fire service is of comparatively modern origin, and in large densely populated cities, can scarcely be considered a safe reliance—the friction caused by water permeating a pipe distribution so extensive and miscellaneous—through pipes of different diameter and at variable velocity necessitates an immense initial pressure.

In New York, and perhaps some other of our larger cities, the depletion incident to daily supply alone has been found so great as to leave little or no pressure at and near the ends of long, and even large, water mains. For the same reason it has been found in many cities that reliability upon direct hydrant service is diminished about inversely as the demand for current supply increases.

In a prosperous and growing city, such as Omaha, these questions are well worthy of most intelligent consideration.

Admonished by the fact that many cities are almost constantly being compelled to take up small pipes and replace them with others of greater capacity, you cannot safely afford to overlook such an essential prerequisite to successful future results.

The following statement, compiled from standard authority, may be found of interest in illustrating some of the general laws pertaining to pipes and their comparative capacity, frictional resistance, etc.:

370 *Table Showing Comparative Distances That Pipes of Different Diameters Will Discharge Equal Quantities of Water under 200 feet Head or an Initial Pressure of Eighty-seven pounds.*

Size of pipe.	Gallons discharged per minute.	Length of pipe in feet.	Total Capacity of Pipe			
4 inches	468	1,000				
6 "	468	7,420	"	"	"	"
6 "	1,200	1,000	"	"	"	"
8 "	1,200	4,776	"	"	"	"
8 "	2,640	1,000	"	"	"	"
10 "	2,640	3,081	"	"	"	"
10 "	4,640	1,000	"	"	"	"
12 "	4,640	2,425	"	"	"	"
12 "	7,200	1,000	"	"	"	"
14 "	7,200	2,183	"	"	"	"
14 "	10,560	1,000	"	"	"	"
16 "	10,560	1,974	"	"	"	"
16 "	14,760	1,000	"	"	"	"
18 "	14,760	1,827	"	"	"	"
18 "	19,920	1,000	"	"	"	"
20 "	19,920	1,693	"	"	"	"
20 "	25,920	1,000	"	"	"	"
24 "	25,920	2,488	"	"	"	"

For convenience of reference, I have also tabulated the suggested pipe distribution for your city as follows:

Pipe Distribution.

Size, inches.	On street.	From street.	To street.	Length in feet.
24	Poppleton	Delaware	Catherine	700
24	Catherine	Poppleton	Mt. Pleasant Av.	650
24	Mt. Pleasant Av.	Catherine	Colfax	200
24	Colfax	Mt. Pleasant Av.	Coburn	1,350
24	Coburn	Colfax	Sheridan	1,300
				<hr/>
				4,200
20	Sheridan	Coburn	St. Mary's	400
20	St. Mary's	Sheridan	Twentieth	2,700
				<hr/>
				3,100
8	St. Mary's	Twentieth	Seventeenth	1,100
8	Howard	Seventeenth	Fifteenth	700
				<hr/>
				1,800

Pipe Distribution—Continued.

Size, inches.	On street.	From street.	To street.	Length in feet.
16	Izard	Eighth	Twenty-first	4,700
16	Twenty-first	Izard	Davenport	2,700
16	Davenport	Twenty-first	Jefferson	850
16	Jefferson	Davenport	Farnam	1,500
16	Farnam	Jefferson	Fairview	800
371				
16	Fairview	Farnam	St. Mary's	1,400
16	St. Mary's	Fairview	Sheridan	500
16	Sheridan	St. Mary's	Coburn	450
16	Coburn	Sheridan	Colfax	1,300
16	Colfax	Coburn	Mt. Pleasant Av.	1,350
16	Mt. Pleasant Av.	Colfax	Delaware	900
16	Delaware	Mt. Pleasant Av.	Poppleton	650
16	Poppleton	Delaware	Liberty	400
16	Howard	Thirteenth	Fifteenth	750
16	Fifteenth	Dodge	Howard	1,540
				19,790
14	Sixteenth	Izard	Dodge	3,450
12	Howard	Tenth	Thirteenth	1,100
12	Tenth	Howard	Leavenworth	1,160
12	Dodge	Thirteenth	Sixteenth	1,100
				3,030
10	Tenth	Leavenworth	Mason	750
10	Tenth	Howard	Dodge	1,540
10	Dodge	Sixteenth	Eighteenth	740
				3,360
8	Howard	Eighth	Tenth	750
8	Sixth	Pierce	Division	400
8	Seventh	Pacific	Pierce	380
8	Tenth	Mason	Pierce	760
8	Twelfth	California	Chicago	760
8	Thirteenth	Chicago	Leavenworth	3,790
8	Fifteenth	Howard	Jackson	380
8	Sixteenth	Izard	Clark	2,200
8	Seventeenth	Dodge	Farnam	780
8	Eighteenth	Dodge	Douglas	380
8	Twenty-third	Cuming	Webster	760
8	Twenty-third	California	Chicago	760
8	Saunders	Cuming	Hamilton	1,440
8	Cuming	Twenty-third	Saunders	200
8	Webster	Twelfth	Twenty-third	3,600
8	Chicago	Thirteenth	Twenty-third	3,970

Pipe Distribution—Continued.

Size, inches.	On street.	From street.	To street.	Length in feet.
8	Chicago	Twenty-third	Twenty-fourth	430
8	Dodge	Tenth	Thirteenth	1,100
8	Dodge	Eighteenth	Twentieth	700
8	Farnam	Ninth	Fifteenth	2,200
8	Mason	Tenth	Thirteenth	1,100
8	Pacific	Seventh	Tenth	1,100
8	Pierce	Sixth	Seventh	360
8	Division	Fifth	Sixth	360
				<hr/>
				28,660
6	Fourth	Walnut	Pine	750
6	Fifth	Division	Spruce	750
6	Sixth	Division	Spruce	750
6	Park Wilde	Pierce	Elm	700
6	Eighth	Howard	Jackson	380
372				
6	Ninth	Capitol	Dodge	360
6	Ninth	Douglas	Harney	760
6	Tenth	Chicago	Dodge	1,080
6	Eleventh	Dodge	Howard	1,540
6	Eleventh	Cass	Davenport	750
6	Twelfth	Capitol	Jackson	2,280
6	Thirteenth	Webster	Chicago	1,150
6	Thirteenth	Mason	Pierce	780
6	Fourteenth	Burt	California	780
6	Fourteenth	Capitol	Howard	1,900
6	Fifteenth	Cuming	Burt	380
6	Fifteenth	Cass	Dodge	1,460
6	Fifteenth	Jackson	Marcy	1,150
6	Sixteenth	Clark	Spruce	1,950
6	Sixteenth	Leavenworth	Marcy	380
6	Eighteenth	Chicago	Cuming	1,830
6	Eighteenth	Farnam	Harney	380
6	Eighteenth	St. Mary's	Leavenworth	950
6	Twentieth	Cuming	California	1,160
6	Twentieth	Cass	Davenport	750
6	Twentieth	Capitol	Dodge	360
6	Twentieth	Douglas	Farnam	400
6	Twentieth	St. Mary's	Leavenworth	700
6	Twenty-second	California	Cass	380
6	Twenty-second	Capitol	Dodge	380
6	Twenty-fourth	California	Dodge	1,840
6	Twenty-fifth	Davenport	Capitol	350
6	Center	Cuming	Hamilton }	1,450
6	Campbell	Cuming	Hamilton }	

Pipe Distribution—Continued.

Size, inches.	On street.	From street.	To street.	Length in feet.
6	Spruce	Sixteenth	Eighteenth	650
6	Hamilton	Saunders	Campbell	1,326
6	Cuming	Fifteenth	Sixteenth	370
6	Cuming	Twentieth	Twenty-third	1,060
6	Cuming	Saunders	Center	1,280
6	Burt	Fourteenth	Fifteenth	350
6	California	Twelfth	Thirteenth	360
6	California	Twenty-second	Twenty-fourth	800
6	Cass	Eleventh	Twelfth	360
6	Cass	Twentieth	Twenty-third	1,060
6	Chicago	Tenth	Twelfth	760
6	Davenport	Twenty-fourth	Twenty-fifth	600
6	Capitol	Sixteenth	Twentieth	1,450
6	Capitol	Twenty-second	Twenty-fifth	1,400
6	Dodge	Ninth	Tenth	370
6	Dodge	Twentieth	Twenty-fourth	1,500
6	Douglas	Ninth	Twentieth	400
6	Farnam	Fifteenth	Twentieth	1,800
6	Harney	Fifteenth	Eighteenth	1,100
6	Jackson	Seventh	Tenth	1,080
6	Leavenworth	Thirteenth	Sixteenth	1,100
6	Marcy	Fifteenth	Sixteenth	350
6	Pierce	Seventh	Thirteenth	2,190
6	Walnut	Fourth	Fifth	360
6	Spruce	Fourth	Sixth	700
				35,330

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4	Cuming	Sixteenth	Twentieth	1,450
4	Burt	Fifteenth	Twenty-third	2,870
4	California	Thirteenth	Twenty-second	3,250
4	Cass	Twelfth	Twentieth	2,900
4	Davenport	Tenth	Twentieth	3,630
4	Capitol	Ninth	Sixteenth	2,550
4	Harney	Ninth	Fifteenth	2,200
4	Jackson	Tenth	Eighteenth	2,940
4	Leavenworth	Eighteenth	Twentieth	640
4	Pacific	Tenth	Thirteenth	1,100
				23,530

Further and more careful examination may indicate desirable changes in foregoing distribution, and several additions will also doubtless be found worthy of favorable consideration. I have accordingly included in the general estimate three miles of six inch pipe to be located hereafter.

The four inch pipe as located will be reinforced by larger pipes

at short intervals, and will thus be comparatively equal to other and larger sizes. When intended for use in fire service it will be connected to the hydrant by a six-inch pipe, so as to supply the hydrant with the full capacity of two four-inch pipe.

As you contemplate depending largely or wholly upon hydrant pressure for fire protection, and as any increase of pressure to counteract frictional loss in long lines of hose will be impossible with reservoir service, and always more or less objectionable with direct pumping, I recommend a liberal and plentiful distribution of hydrants; that they be placed not over 400 feet apart, especially in the more thickly settled portions of the city. There is a manifest economy—as well as an almost incredible difference in efficiency—between six inch pipe and two-and-a-half inch hose. Under 200 feet head and through 100 feet of hose a one-and-a-quarter inch nozzle will discharge 289 gallons of water per minute, and lose by friction thirty pounds, while a loss for a similar discharge through 100 feet of six-inch pipe would be less than four-tenths of one pound, or a loss of head of 71 6-10 and 1 52-100 feet respectively. The total cost of six-inch pipe laid should not exceed eighty (80) cents per foot, while the cost of four-ply rubber hose would not be less than one (\$1) dollar per foot; the hose having the advantage of portability, and the pipe the advantage of durability; the city paying cash for hose and interest on the pipe, the average life of hose being, say five years, and the pipe practically indestructible.

The annexed table, which is in the main a record of practical tests, will more fully illustrate this vitally important natural law, and furnish a plain and demonstrable argument in favor of
374 liberality in your hydrant distribution:

Table Showing Horizontal and Vertical Distances Reached by Fire Streams, in Still Air Under Hydrant Pressure of Eighty-seven Pounds, or Two Hundred Feet Head, Together with Number of Gallons Discharged Per Minute Through Different Lengths of 2½ inch Rubber Hose, Using Smooth Nozzles of Different Diameters.

1 inch nozzle.					1½ inch nozzle.			
Length of hose, feet.	Pressure at nozzle.	Gallons disch'd.	Horiz'al distance reached.	Vertical distance reached.	Pressure at nozzle.	Gallons disch'd.	Horiz'al distance reached.	Vertical distance reached.
100	72	208	158	123	65	250	156	119
200	67	197	143	110	52	233	135	100
300	53	178	131	99	43	203	119	86
400	47	168	121	90	37	188	107	75
500	43	161	114	83	32	175	97	66
600	39	153	107	77	29	167	91	61
700	35	145	99	71	26	158	84	55
800	33	140	96	67	24	150	79	50
900	30	134	90	62	22	144	75	46
1000	28	130	86	58	20	139	71	43

Length of hose, feet.	1½ inch nozzle.				1¾ inch nozzle.			
	Pressure at nozzle.	Gal- lons disch'd.	Horiz'al distance reached.	Vertical distance reached.	Pressure at nozzle.	Gal- lons disch'd.	Horiz'al distance reached.	Vertical distance reached.
100	57	289	151	110	49	324	144	100
200	42	248	123	86	35	270	110	74
300	34	223	105	71	26	236	91	58
400	28	202	91	59	22	214	80	47
500	24	188	82	51	18	198	71	41
600	18	162	68	39	16	185	65	36
700	16	149	62	34	14	173	60	32
800	14	143	59	31	12	166	57	29
900	12	133	54	27	11	153	51	25
1000	11	127	51	25	10	148	50	24

Location of Hydrants.

For number and location of hydrants as recommended, I submit the following table:

1, Fourth, corner Pine; 2, Fourth, corner Spruce; 3, Fourth, corner Walnut; 4, Fifth, corner Spruce; 5, Fifth, corner Walnut; 6, Fifth, corner Division; 7, Sixth, corner Spruce; 8, Sixth, corner Walnut; 9, Sixth, corner Division; 10, Sixth, corner Pierce; 11, Seventh, corner Pierce; 12, Seventh, corner Pacific; 13, Park Wilde, corner Elm; 14, Park Wilde, between Pierce and Elm; 15, 375 Eighth, corner Howard; 16, Eighth, corner Jackson; 17, Eighth, corner Pacific; 18, Eighth, corner Pierce; 19, Ninth, corner Capitol Avenue; 20, Ninth, corner Dodge; 21, Ninth, corner Douglas; 22, Ninth, corner Farnam; 23, Ninth, corner Howard; 24, Ninth, corner Jackson; 25, Tenth, corner Chicago; 26, Tenth, corner Davenport; 27, Tenth, corner Capitol Avenue; 28, Tenth, corner Dodge; 29, Tenth, corner Douglas; 30, Tenth, corner Farnam; 31, Tenth, corner Harney; 32, Tenth, corner Howard; 33, Tenth, corner Jackson; 34, Tenth, corner Jones; 35, Tenth, corner Leavenworth; 36, Tenth, corner Marcy; 37, Tenth, corner Mason; 38, Tenth, corner Pacific; 39, Tenth, corner Pierce; 40, Eleventh, corner Cass; 41, Eleventh, corner Chicago; 42, Eleventh, corner Davenport; 43, Eleventh, corner Capital Avenue; 44, Eleventh, corner Dodge; 45, Eleventh, corner Douglas; 46, Eleventh, corner Farnam; 47, Eleventh, corner Harney; 48, Eleventh, corner Howard; 49, Eleventh, corner Jackson; 50, Eleventh, corner Mason; 51, Eleventh, corner Pacific; 52, Eleventh, corner Pierce; 53, Twelfth, corner California; 54, Twelfth, corner Cass; 55, Twelfth, corner Chicago; 56, Twelfth, corner Davenport; 57, Twelfth, corner Capitol Avenue; 58, Twelfth, corner Dodge; 59, Twelfth, corner Douglas; 60, Twelfth, corner Farnam; 61, Twelfth, corner Harney; 62, Twelfth, corner Howard; 63, Twelfth, corner Jackson; 64, Twelfth, corner Mason; 65, Twelfth, corner Pacific; 66, Twelfth, corner Pierce; 67, Thirteenth, corner Webster; 68, Thirteenth, corner California; 69, Thirteenth, corner Cass; 70, Thirteenth, corner Chicago; 71, Thirteenth, corner Davenport; 72, Thirteenth, corner

Capitol Avenue; 73, Thirteenth, corner Dodge; 74, Thirteenth, corner Douglas; 75, Thirteenth, corner Farnam; 76 Thirteenth, corner Harney; 77, Thirteenth, corner Howard; 78, Thirteenth, corner Jackson; 79, Thirteenth, corner Jones; 80, Thirteenth, corner Leavenworth; 81, Thirteenth, corner Mason; 82, Thirteenth, corner Pacific; 83, Thirteenth, corner Pierce; 84, Fourteenth, corner Burt; 85, Fourteenth, corner Webster; 86, Fourteenth, corner California; 87, Fourteenth, corner Cass; 88, Fourteenth, corner Chicago; 89, Fourteenth, corner Davenport; 90, Fourteenth, corner Capitol Avenue; 91, Fourteenth, corner Dodge; 92, Fourteenth, corner Douglas; 93, Fourteenth, corner Farnam; 94, Fourteenth, corner Harney; 95, Fourteenth, corner Howard; 96, Fourteenth, corner Jackson; 97, Fourteenth, corner Leavenworth; 98, Fifteenth, corner Cuming; 99, Fifteenth, corner Burt; 100, Fifteenth, corner Webster; 101, Fifteenth, corner California; 102, Fifteenth, corner Cass; 103, Fifteenth, corner Chicago; 104, Fifteenth, corner Davenport; 105, Fifteenth, corner Capitol Avenue; 106, Fifteenth, corner Dodge; 107, Fifteenth, corner Douglas; 108, Fifteenth, corner Farnam; 109, Fifteenth, corner Harney; 110, Fifteenth, corner Howard; 111, Fifteenth, corner Jackson; 112, Fifteenth, corner Jones; 113, Fifteenth, corner Leavenworth; 114, Fifteenth, corner Marcy; 115, Sixteenth, corner George Smith's; 116, Sixteenth, corner Grace; 117, Sixteenth, corner Clark; 118, Sixteenth, corner Sherman; 119, Sixteenth, corner Nicholas; 120, Sixteenth, corner Izard; 121, Sixteenth, corner Cuming; 122, Sixteenth, corner Burt; 123, Sixteenth, corner Webster; 124, Sixteenth, corner California; 125, Sixteenth, corner Cass; 126, Sixteenth, corner Chicago; 127, Sixteenth, corner Davenport; 128, Sixteenth, corner Capitol Avenue; 129, Sixteenth, corner Dodge; 130, Sixteenth, corner Douglas; 131, Sixteenth, corner Farnam; 132, Sixteenth, corner Harney; 133, Sixteenth, corner Howard; 134, Sixteenth, corner Jackson; 135, Sixteenth, corner Leavenworth; 136, Sixteenth, corner Marcy; 137, Seventeenth, corner Izard; 138, Seventeenth, corner Cuming; 139, Seventeenth, corner Burt; 140, Seventeenth, corner Webster; 141, Seventeenth, corner California; 142, Seventeenth, corner Cass; 143, Seventeenth, corner Chicago; 144, Seventeenth, corner Davenport; 145, Seventeenth, corner Capitol Avenue; 146, Seventeenth, corner Dodge; 147, Seventeenth, corner Douglas; 148, Seventeenth, corner Farnam; 149, Seventeenth, corner Harney; 150, Seventeenth, corner Howard; 151, Seventeenth, corner Jackson; 152, Eighteenth, corner Spruce; 153, Eighteenth, corner Izard; 154, Eighteenth, corner Cuming; 155, Eighteenth, corner Burt; 156, Eighteenth, corner Webster; 157, Eighteenth, corner California; 158, Eighteenth, corner Cass; 159, Eighteenth, corner Chicago; 160, Eighteenth, corner Davenport; 161, Eighteenth, corner Capitol Avenue; 162, Eighteenth, corner Dodge; 163, Eighteenth, corner Douglas; 164, Eighteenth, corner Farnam; 165, Eighteenth, corner Harney; 166, Eighteenth, corner St. Mary's; 167, Eighteenth, between Jackson and Leavenworth; 168, Eighteenth, corner Leavenworth; 169, Nineteenth, corner Izard; 170, Nineteenth, corner Cuming; 171, Nineteenth, corner Burt; 172, Nineteenth, corner Webster; 173, Nine-

we have little or no precedent, we are left almost wholly to the dictates of theory. Actual experience may render necessary a more elaborate cleansing device, and the influent arrangements should accordingly contemplate the addition hereafter of preliminary settling basins near the river if found necessary. Such an arrangement need necessitate little or no additional cost, excepting the actual cost of subsiding basins, their pumping machinery and connections, thus involving simply an extension instead of a revision of the system as above suggested. The first pumping could be done from main pump station, either by the regular auxiliary engine or by a low service engine designed expressly for this purpose, to be situated in regular pump house and supplied with steam from main boilers. It has been abundantly established by experiments that 90 to 95 per cent of the heavier sediments can be removed by settling from one to two hours. The preliminary settling basins therefore need not be very large or expensive. Such a composite arrangement, if ultimately found necessary, affording facilities for both preliminary and final subsidence, ought to remove all reasonable doubts on this important question.

It would be desirable to have three reservoirs, each with a capacity of not less than 3,000,000 gallons, with suitable pipes, wells and other devices to render them interchangeable in service, and for removing sedimentary accumulations. With a well matured device, and intelligent attention in after management, most of the sediment could undoubtedly be removed in a semi-liquid state by ordinary drainage, through South or North Omaha creeks, or utilized in filling and bringing into use some of the deep ravines through which the upper waters of these streams flow.

In view of the fact so well established by many experiments, that this water after twenty-four hours subsidence usually becomes almost perfectly limpid, it certainly seems fair to conclude that such a reservoir service ought to render your supply uniformly acceptable.

I have also carefully considered the eligibility of the point on the river from which to draw your supply, and recommend that
380 your pump station be located near the eastern terminus of Izard street, and as near the river as may be found practicable.

The influent arrangement to consist of a circular cast iron well six feet or more in diameter to be settled to bed rock, which at this point is some twenty feet below low water; it is proposed to place the well on the shore side of the rip-rap and contiguous thereto, with three or more influent pipes passing through to face of rip-rap at different altitudes, to facilitate taking water from near the surface at variable stages of the river. The well to be also connected with the pumps by a suction pipe at least thirty inches in diameter, and the whole to be provided with such valves, man-holes, etc., as to render every part accessible and easily cleansed.

The river approaches this point on nearly a due west course, and now occupies what is generally believed to be a stable channel, large expenditures having been made to secure it by the general government, and also by the several railroad companies interested in its perpetuity.

The channel is so far removed from the northern portion of the city as to be unquestionably beyond the range of deleterious drainage. Near the end of Izard street it changes to a southerly course and is in the main so thoroughly under control of an efficient system of dykes, rip-rapping, etc., that its stability almost ceases to be problematical.

The contingent danger of sewerage contamination from Council Bluffs having been suggested, I visited that city for the attainment of information on this point, and am fully convinced that no such solicitude can have any reasonable foundation. The established street grade near the court house in that city, corner of Pearl and Buckingham streets, is 36 6-10 feet above low water in the river at U. P. R. R. bridge, or 33 6-10 feet above the river at outlet at Spring Lake opposite the city. Their lowest street grade is 16 9-10 feet above the same point. In order to properly drain cellars, the top of sewer should be 10 feet below street grade; the shortest distance from the court house to the river is about two and one-half miles or 13,200 feet. Estimating the fall or descent of sewer grade at a minimum ratio of one foot vertical per 1,000 feet of length would bring the mouth of sewer 23 feet below street grade and six feet below the surface of river at low water, or some 28 feet below high water line, high water frequently reaching an elevation of four to six feet above the lowest established street grade in the city. In view of which, and the further fact that Council Bluffs can find a cheaper and more feasible system of drainage through Indian Creek, which
381 passes into the river at some distance below the U. P. R. R. Bridge, I think we have tenable reasons for dismissing all fears of contamination from this source.

The foundations for buildings and machinery should rest on piling driven to the rock, or to refusal, or upon concrete, as more thorough examination may dictate.

The force main to be 16 inches in diameter, extending from pumps to reservoirs, as before described. If connected at any intermediate point with the general distribution, the lateral or connecting pipes should be supplied with valves, to be kept closed (excepting in possible emergencies) leaving the entire distribution to be supplied with clear water from the reservoirs.

Your pumping machinery should consist of two engines having an easy aggregate capacity to pump 5,000,000 gallons in twenty-four hours into the reservoirs, with the additional power necessary to increase the pressure when required in fire service on the higher portions of the city; also of boilers having double the necessary capacity to operate the entire machinery without over-crowding or forcing fires.

The usual important question of duty or economy in current performance, can only affect the interest of the water company upon whom will devolve the cost of operating the works and it is therefore not necessarily a legitimate subject of discussion in this respect.

I respectfully refer you to the following general estimates which it is believed will fully cover the cost of the works as herein described, at present rates of labor and material.

Estimate No. 1 contemplates the location of reservoirs near Hanscom Park. Estimate No. 2 contemplates reservoirs of same capacity, with less altitude, to be located on Farnam street near the center of distribution.

Estimate No. 1.

Reservoirs, Hanscom Park, Flow Line Three Hundred and Five Feet.

144,090 lin. feet, or 27 47-100 miles of pipe laid (4,273 tons)	\$199,000
72 tons special castings, at \$60.	4,320
247 fire hydrants, including setting.	12,350
Valves, boxes, vaults and setting.	8,235
Engine and boiler house, smoke stack and connections	9,500
382 Two pumping engines, aggregate capacity 5,000,000 gallons per 24 hours, including four return tubular boilers, five feet four inches in diameter, sixteen feet long, all foundations, settings, check and foot valves, piping, fitting, and everything necessary to render the pumping service complete.	30,500
Reservoirs, complete	30,000
River work and influent connections.	10,000
	<hr/>
	\$303,905
Add, for errors, omissions, etc, five per cent.	15,195
	<hr/>
Total	\$319,100

Estimate No. 2.

Reservoirs, Farnam Street, Opposite Fairview Avenue: Flow Line Two Hundred and Fifty-five Feet.

132,490 lin. feet, or 25 9-100 miles of pipe laid, (tons 3,163)	\$150,000
70 tons special castings, at \$60.	4,200
247 fire hydrants, including setting.	12,350
Valves, boxes, vaults and settings.	8,235
Engine and boiler house, smoke stack and connections.	9,500
Two pumping engines, aggregate capacity 5,000,000 gallons per twenty-four hours, including four return tubular boilers 5 ft. 4 in. diameter, 16 ft. long—all foundations, settings, check and foot valves, piping, fitting and everything necessary to render the pumping service complete	30,500
Reservoirs complete.	49,500
River work and influent connections.	10,000
	<hr/>
	\$274,285
Add for contingencies five per cent.	13,715
	<hr/>
Total	\$288,000

The foregoing estimates and recommendations are intended to describe, and contemplate throughout, a first-class system of water works. A less elaborate system might furnish you reasonably well for a time, but with your present corporate importance and inevitably great prospective increase, I do not feel justified in recommending with the single view of barely meeting your present needs. I have

endeavored to keep the cost as low as possible, consistent with
383 utility; realizing the fact that the works, if constructed, will have to be done by a private company, who will naturally regard the enterprise from a purely financial standpoint, and that a comparison of original cost with the revenues from franchise and all other sources must be the governing element in the negotiation.

By placing your reservoir at a less altitude, as set forth in estimate No. 2, the cost can be materially reduced. If sufficient land could be reasonably obtained near this point, you can have a flow line of 255 to 260 feet elevation—fifty-five feet above the High School level—giving ample service for domestic pressure for the entire district covered by present pipe distribution, and deliver water at the highest points in the city, excepting on the heights adjacent to Hanscom Park. This could be supplied when necessary, either by a small high service reservoir or by a large stand pipe near the main reservoirs. I submit no estimate for real estate in either case, not being sufficiently advised as to values. The Hanscom Park reservoirs would occupy one block as now recorded and the Farnam street reservoirs 350 by 580 or 203,000 square feet.

The practical difference in altitude, when delivering water at the rate of 5,000,000 gallons per twenty-four hours, would be thirty-four feet—the aggregate loss by friction in 4,200 feet of twenty-four inch and 3,100 feet of twenty inch pipe (distance saved by nearer location) being about sixteen feet.

The current cost of operating the works after completion would also be diminished about two (\$2) dollars per day, or eight hundred (\$800) dollars per annum.

Without further investigation, I am not now prepared to more than correctly advert as above to the leading characteristics of two locations. Your final decision must be subject to cost of real estate, and perhaps other, as yet, unknown contingencies.

The introduction of a public water supply, especially when taken from a running stream, is often beset by a general prejudice against its fitness and a blind adherence to former sources. Well water being clear and cold, is frequently held in high esteem, regardless of the age of the well or surroundings, which may unceasingly contaminate its waters. In a deep, porous soil, such as yours, nothing can be more logical or natural than the proposition that the well—usually the lowest point about the premises—must necessarily serve in the double capacity of furnishing water to the household and
384 receiving in return many of the most dangerous elements of pollution from houses, barns, etc. The fact that it continues to furnish clear water cannot be safely taken as an evidence of purity. Modern experience and investigation have served to overturn many time-honored theories; in this regard chemical research

had demonstrated the fallacy of looking to wells for the purest water, and signally exploded the theory that limpidity is to be taken as the standard of purity—that some of the clearest waters are really the most harmful. For instance, the outflow from sewers, excepting in times of rain and flood, is usually as clear as the clearest well water.

Rain water is also often erroneously regarded as the purest attainable source of supply. Impure gases evolved from centers of population, from the combustion of coal, and from the evaporation of surface impurities generally, are largely absorbed and taken in solution by the descending rain, purifying the air and contaminating the water. The countless germs of organic life which are washed from roofs into cisterns also have a constant tendency to impregnate the water with irremediable pollution, excepting by distillation, and having none of the self-purifying attributes of the running stream, cistern water is usually the first to acquire an offensive smell when left covered and quiescent.

On the other hand, the Missouri water, although at times unsightly, almost beyond comparison, carries nothing really harmful either in suspension or solution. It is unequalled anywhere in the rapidity with which its heavy sediments precipitate, and chemistry finds it almost unsurpassed in purity and fitness for all uses, public and private. These considerations vastly outweigh all the expense and trouble incident to its clarification, and in this regard it may be justly esteemed in the light of a blessing to all the cities along its shores.

In view of these demonstrable facts, which must ultimately insure a large patronage, coupled with very reasonable cost for works of such perfection and magnitude, you can offer to capitalists a legitimate, safe and remunerative investment.

Toledo, Ohio, May 20, 1880.

Respectfully submitted,

J. D. COOK.

Filed in the office of the city clerk May 25, 1880.

Approved by city council June 8, 1880.

Attest:

J. F. McCARTNEY, *City Clerk.*

Appendix.

385

As the result of further examination and conference with the committee, I now suggest the following additional lines of pipe, which it may be fair to estimate as six inch pipe, although a portion of it may require larger diameter, and perhaps a part of it smaller. As the regular distribution contemplates rather an unusual large amount of eight inch pipe, a little readjustment will readily meet all requirements.

Increased-Distribution.

	Feet.
Seventh Street from Lincoln to Pacific.....	1, 150
Leavenworth, from Seventh to Tenth.....	1, 090
Pacific from Sixth to Seventh.....	360
Pierce, from Fifth to Sixth.....	360
Fifth, from Pierce to Division.....	360
Sixth, from Pierce to Pacific.....	380
Spruce from Third to Fourth.....	360
Third, from Spruce to Pine.....	380
Pine, from Second to Third.....	360
Second, from Pine to Chestnut.....	250
Eleventh, from Pierce to Pacific.....	380
Tenth, from Pierce to Castellar.....	4, 300
Castellar, from Tenth to Eleventh.....	360
Eleventh, from Castellar to Martha.....	500
Martha, from Tenth to Eleventh.....	360
Thirteenth, from Leavenworth to Mason.....	770
In Thirteenth, from Pierce to Williams.....	920
In Williams, from Thirteenth to Fourteenth.....	380
In Fourteenth, from Williams to Pierce.....	920
In Pierce, from Thirteenth to Fourteenth.....	380
In Leavenworth, from Sixteenth to Seventeenth.....	250
In Seventeenth, from Leavenworth to Hickory.....	3, 400
In Eighteenth, from Cuming to Nicholas.....	760
In Nicholas, from Eighteenth to Nineteenth.....	360
In Nineteenth, from Nicholas to Cuming.....	760
In Clark, from Sixteenth to Nineteenth.....	1, 000
In Nineteenth, from Clark to Grace.....	600
In Grace, from Sixteenth to Nineteenth.....	1, 000
Total	22, 450

From which deduct distribution as shown in regular report
as follows:

In Jackson Street, from Seventh to Eighth.....	360
In Fourth, from Spruce to Pine.....	360
386 In Pierce, from Tenth to Thirteenth.....	1, 100
In Mason, from Tenth to Thirteenth.....	1, 100
Total	2, 920
Actual addition.....	19, 530
Less three miles or 15,840 feet extra pipe as given in regular report	15, 840
Actual increase	3, 690

This would add to aggregate cost of works about two thousand nine hundred (\$2,900) dollars, and increase the total length of pipe distribution, as contemplated in estimate No. 1, to something over twenty-eight miles.

Further conference and examination also indicate the comparative safety of diminishing the hydrant distribution in some of the less important portions of the city, sufficient to supply the added pipe distribution without increasing the aggregate number of hydrants above 250.

I therefore suggest the following distribution or location of hydrants along the added street mains:

Grace and Eighteenth streets, Grace and Nineteenth, Clark and Eighteenth, Clark and Nineteenth, Nicholas and Eighteenth, Nicholas and Nineteenth, Mason and Seventeenth, Pierce and Seventeenth, Williams and Seventeenth, Williams and Thirteenth, Fourteenth at alley between Williams and Pierce, Marcy and Thirteenth, Briggs and Tenth, Hickory and Tenth, Charles and Tenth, Castellar and Tenth, Castellar and Eleventh, Martha and Eleventh, Pacific and Sixth, Pierce and Fifth, Spruce and Third, Chestnut and Second, Leavenworth and Ninth, Leavenworth and Seventh—total twenty-four. And the removal of the same number from the following points in the original distribution: Howard and Ninth, Jackson and Seventh, Pine and Fourth, Walnut and Fifth, Mason and Eleventh, Mason and Twelfth, Pierce and Twelfth, Burt and Fifteenth, Burt and Seventeenth, Burt and Nineteenth, Burt and Twenty-first, Burt and Twenty-third, Webster and Fourteenth, California and Thirteenth, California and Fifteenth, California and Seventeenth, California and Nineteenth, California and Twenty-first, Cass and Twelfth, Chicago and Eleventh, Davenport and Tenth, Pierce and Sixth, Spruce and Fourth, St. Mary's and Eighteenth—twenty-four.

Reference being had to accompanying map, which will
387 fully illustrate complete pipe and hydrant distribution, including all revisions to date.

Respectfully submitted,

J. D. COOK.

Filed in the office of the City Clerk, May 31, 1880.

Approved by City Council, June 8, 1880.

Attest:

J. F. McCARTNEY, *City Clerk*.

For Water Works Ordinance No. 423, see page 1250 of this record.

For Ordinance No. 430, see page 1260 of this record.

For Water Works Contract, see page 1264 of this record.

For Assignment to City Water Works Co., see page 1267 of this record.

*Ordinance No. 445.***Water Works.**

An ordinance permitting S. E. Locke, or his assigns, contractors with the city of Omaha for the erection and maintenance of water works and supplying said city with water for public use, to locate the reservoirs of said water works upon Reservoir addition to the City of Omaha instead of near Hanscom Park.

Be It *Ordered* by the City Council of the City of Omaha:

SECTION 1. That whereas, under the terms and conditions of ordinance No. 423, passed June 11, 1880, entitled, "An ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, state of Nebraska", and of ordinance No. 430, passed, July 15, 1880, amendatory thereof, S. E. Locke, being the lowest and best bidder, was awarded the contract for furnishing the City of Omaha with water for fire protection and public use, and did, upon the 20th day of July, 1880, enter into contract with the said City of Omaha to furnish to it such water supply, and did accept the terms and conditions of said ordinances Nos. 423 and 430, and did enter into bonds with said city for the faithful performance of said contract; and whereas, it was provided by the report of J. D. Cook, engineer, filed May 25, 1880, and the appendix thereto filed May 31, 1880, which were duly made a part of said ordinances and were accepted as the plan of said water works by the said S. E. Locke, that the site of the reservoir should be near "Hanscom Park"; and whereas, on the 6th day of October A. D. 388 1880, the said S. E. Locke, or his assigns, filed with the city clerk of the city of Omaha, the report of J. D. Cook, consulting engineer, dated September 20, 1880, recommending that the site of such reservoirs be changed from Hanscom Park to a tract of land adjoining the western limits of the city of Omaha, bounded on the north and south by Hamilton and Cuming streets, and west by the county road near the north and south center line of section 17, township 15, range 13 east of the 6th principal meridian, which said tract of land has since been platted by its proprietors Samuel R. Johnson and Nathan Shelton, as an addition to the city of Omaha; and is now a part of said city, known as Reservoir addition to the city of Omaha; and whereas, the said S. E. Locke, or his assigns, have made petition and request to the city council of the city of Omaha to change the location of said reservoirs from said Hanscom Park to said last described lands; and, whereas, the recommendation of said J. D. Cook, consulting engineer, is concurred in by Henry Rohwer, city engineer of Omaha; therefore the said S. E. Locke, or his assigns, is hereby authorized and permitted to locate said reservoirs of the said water works upon said tract of land now a part of the city of Omaha, known as Reservoir addition to the City of Omaha as surveyed, platted, approved by the mayor and city council and of record in the office of the county clerk of Douglas County Nebraska, Provided However, and this change of said reser-

voir is permitted to be made upon the following conditions, viz: there shall be no change of hydrants, and of the location thereof, as provided in said ordinances Nos. 423 and 430, and the accompanying plans, unless such change shall be made by the city council as provided for in said ordinances; there shall be no extension of the time provided in section 13 of ordinance No. 423, from such change of site of reservoirs; and said water works shall be constructed and completed within one year of the 20th day of July, A. D. 1880; there shall be no lessening of the sizes of the mains and pipes from the sizes fixed in said reports of J. D. Cook, engineer, filed May 25, 1880, and May 31, 1880; and any new locations or change in the mains and pipes necessitated by the change of the site of the reservoir shall be subject to the inspection, approval and allowance of the city council of Omaha.

SEC. 2. The change of site of said reservoirs of said water works contemplated by the first section of this ordinance shall not be authorized or permitted until there shall be filed in the office of the city clerk of the city of Omaha the written acceptance and consent to this ordinance of said S. E. Locke and his assigns, and also the written consent to this ordinance and the contemplated change
389 of location of reservoirs of all the sureties upon the bond of said S. E. Locke, filed July 20th, 1880, and the agreement of said sureties with the city of Omaha that nothing herein contained shall be considered as releasing the said sureties from their obligation upon said bond.

SEC. 3. This ordinance shall take effect and be in force from and after its passage.

(Passed November 9, A. D. 1880.)

Attest:

(Signed)

J. F. McCARTNEY, *City Clerk*.
JAMES E. BOYD,
Pres't City Council.

Approved November 11, A. D. 1880.

(Signed)

CHAMPION S. CHASE, *Mayor*.

Ordinance No. 469.

An Ordinance to amend section 13 of ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, state of Nebraska."

Be It Ordained by the City Council of the City of Omaha:

SECTION 1. That section 13 of ordinance No. 423 entitled "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska", passed June 11, 1880, be and the said section is hereby amended so as read as follows:

"SEC. 13. The said water works shall be constructed and completed within one year and four months from and after the date of the award of the contract for public supply and fire protection unless the city council shall, by ordinance, extend said time."

SEC. 2. This ordinance shall take effect from and after its passage, (Passed July 19, 1881).

Attest:

J. J. L. C. JEWITT, *City Clerk*.
THOMAS A. DAILEY,
Pres't City Council.

Approved July 26, 1881.

JAMES E. BOYD, *Mayor*.

Ordinance No. 618.

390 An Ordinance accepting the water works built for the city of Omaha by the City Water Works Company of Omaha, under ordinances Nos. 423, 430, 445 and 469, and the contract entered into in pursuance thereof.

Be It Ordained By the City Council Of The City Of Omaha:

SECTION 1. That the water works constructed by the City Water Works Company of Omaha, assignees and successors of Sidney E. Locke, under and by virtue of ordinances of the city of Omaha, Nos. 423, 430, 445 and 469, and the contract entered into in accordance therewith, and approved by the city council July 20th 1880, be and the same are hereby accepted by the mayor and city council as a full and complete compliance with said contract and ordinances by said water works company, and that the time of completion of said water works as mentioned, stated and designated in said ordinances and contract be and the same is hereby extended to, and shall be construed to refer to and mean, the date of the approval of this ordinance by the mayor of said city.

SEC. 2. This ordinance shall take effect and be in force from and after its passage and approval.

W. I. BAKER,
Pres't City Council.

Attest:

J. J. L. C. JEWETT, *City Clerk*.

Approved September 4, 1883.

C. S. CHASE, *Mayor*.

United States Court in and for the District of Nebraska.

No. 96. Doe. "Q".

FARMERS' LOAN & TRUST COMPANY, Plaintiff,
vs.

THE AMERICAN WATER WORKS COMPANY OF ILLINOIS et al.,
Defendants.

This cause came on to be heard upon the mandate from the decree of the Circuit Court of Appeals of the Eighth Circuit upon the appeals of the American Water Works Company of Illinois, The American Water Works Company of New Jersey, and Alonzo B.

Hunt, Temporary Receiver of the American Water Works Company of New Jersey, and the appeal of Thaddeus S. Clarkson, Receiver of the American Water Works Company of Illinois, and the application of the Farmers' Loan & Trust Company for an order of this Court to make the decree of this Court, formerly entered in this case, conform to the decree of this Circuit Court of Appeals made upon the appeals aforesaid, and in compliance with the orders of said Court, upon consideration whereof it is now here .

Ordered, Adjudged and Decreed by this Court in order to
391 comply with the modifying of its original decree by said
Circuit Court of Appeals, that said original decree of this
Court be and the same is hereby modified by adding thereto the following paragraph, to-wit

"All sums of money required to be paid under the provisions of this decree shall be paid in legal tender money of the United States; but the plaintiff or any other bidder at the sale herein provided for may answer his bid with the bonds or coupons heretofore mentioned which shall be received in payment of such bid for an amount equal to the sum of money which the holder of said bonds or coupons so tendered would be entitled to receive on account thereof on the distribution of the purchase price bid at such sale. Said sale shall be made at the Court House of the County of Douglas in the State of Nebraska, that being the County in which the property to be sold is situated. Notice of such sale shall be published once a week for at least four successive weeks in the 'Omaha Daily World-Herald', and the 'Omaha Daily Bee', said newspapers being printed, regularly issued and published and having a general circulation in said County of Douglas, State of Nebraska, and also in some newspapers printed, published and regularly issued, and having a general circulation in the City of New York. All provisions of the original decree to which this paragraph is amendatory, which are in conflict with any of the provisions of this paragraph are hereby cancelled and annulled but in all other respects said original decree as entered by this Court on the 24th day of June, 1895, shall be and remain firm and effectual, and as the final decree in this action."

April 7th, 1896.

JOHN A. RINER, *Judge*.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

In the Circuit Court of the United States for the District of Nebraska. In Equity.

Report of Sale.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE AMERICAN WATER WORKS COMPANY et al., Respondents.

To the Judges of the Circuit Court of the United States for the District of Nebraska, in Equity sitting:

In pursuance and by virtue of a decretal order of said
392 Court, made in the above entitled cause, and bearing date the
24th day of June, 1895, and order making decree of Circuit
Court of Appeals the decree of this Court, entered herein the 7th
day of April, 1896, by which it was, among other things, ordered,
adjudged and decreed, that all and singular the said mortgaged
premises mentioned in the bill of complaint in this cause and hereinafter described, or so much thereof as might be sufficient to raise
the amount reported due to the complainant, as therein mentioned,
for the principal and interest and the costs in this case, and which
might be sold separately without material injury to the parties interested, to be sold at public auction, by or under the direction of one
of the Masters in Chancery of said Court, at any time after sixty
days from the 24th day of June, 1895; that the said sale be made at
the east door of the Douglas County Court House in the City
of Omaha, Douglas County, State and District of Nebraska; that
the said Master give public notice of the time and place of such
sale in the Omaha Daily Bee and the Omaha Daily World-Herald,
newspapers printed, regularly issued and published, and having a
general circulation in the City of Omaha, the County of Douglas
and the State of Nebraska, and also the Evening Post, a newspaper
printed, regularly issued and published and having a general circulation in the City and State of New York. And that the complainant or any of the parties in this cause might become the purchaser; that the said Master execute a deed or deeds to the purchaser or purchasers of the said mortgaged premises on the said sale; and that said Master, out of the proceeds of the said sale, pay the costs of this suit, and pay to said complainant or its solicitor the amount so reported due as aforesaid, together with interest thereon at the rate of five per cent per annum from the date of said report, or so much thereof as the purchase money of the mortgaged premises would pay of the same; and that the said Master take receipts for the amounts so paid, and file the same with this report; and that he bring the surplus moneys arising from said sale, if any there should be, into Court without delay, to abide the further order of the Court; and it is further ordered and decreed that if the moneys arising from said sale should be insufficient to pay the amount so reported

due the complainant, with interest and costs and expenses of sale as aforesaid, that said Master specify the amount of such deficiency in his report of said sale.

I, the undersigned, E. S. Dundy, Jr., one of the Masters in Chancery of said Court, do respectfully certify and report, that having been charged by the Solicitors for the complainant with the execution of the said Decretal Order, I advertised said premises to be sold by me at public auction, to the highest bidder, at the east door of the Douglas County, Court House in the City of Omaha, 393 State of Nebraska, on the twentieth day of May, 1896, at ten o'clock in the forenoon of that day; that previous to said sale I called an inquest of two disinterested free holders, residents of the District of Nebraska, and duly appraised the interest of the said respondent in the mortgaged premises herein, at its real value in money, in accordance with the Statutes of the State of Nebraska in such case provided, which said appraisement is hereto attached, and made a part of this my report; and that previous to said sale I caused notice thereof to be publicly advertised thirty days before said sale, by causing notice of such sale to be printed and published in the Omaha Daily Bee, the Omaha Daily World-Herald, and the Evening Post, of New York, the newspapers designated by order of the Court in which this legal advertisement should be made, which notices contained a brief description of the said mortgaged premises; copies of said published notices with the proper affidavits of publication thereof annexed and made a part of this my report.

And I do further report that on said twentieth day of May, 1896, the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale and exposed said premises for sale at public auction, to the highest bidder and the said premises were then and there fairly struck off to The Farmers' Loan & Trust Company, as Trustee for the holders of bonds herein to the amount of \$3,554,000.00 who have requested said Trustee to bid in the property on their behalf and for their benefit, for the sum of four million nine thousand, five hundred dollars (\$4,009,500.00), said sum being the highest sum offered for said property and said sum being in excess of two-thirds of the appraisement of said property and premises and said persons being the highest bidders therefor.

And I do further certify and report, that the said mortgaged premises did not sell for a sum sufficient to satisfy said decree, interest and costs, together with the costs and expenses of said sale, but there remains a balance due to said complainant under said decree after said sale, amounting to the sum of — dollars, as appears by "Schedule A" hereto annexed.

And I further certify and report that the premises so sold as aforesaid, were described in said Decretal Order as follows, viz:

That piece or parcel of land known and described as the north fifty (50) feet of lot eighteen (18) and the west ten (10) feet of the north fifty (50) feet of Lot Seventeen (17) both in Block

Two (2) of Armstrong's Addition to the City of Omaha, 394 according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

The above described property sold for the sum of two thousand dollars (\$2,000.00).

And also that other certain parcel of land known and described as the west twenty-five (25) acres of the south one half of the north-east one quarter of section seven (7) in township fifteen (15) north of Range thirteen (13) east of the Sixth Principal Meridian.

The above described property sold for the sum of seven thousand five hundred dollars (\$7,500.00).

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way line to the North line of Washington Street in said City; thence easterly along the north line of said Washington Street to the east line of Mill Street in said City; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west [—] of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the City of Omaha, according to a plat of said Addition recorded in the said Registrar's office;

Also that other parcel of land known as Lot B. in Reservoir Addition to the City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7) and Eight (8) in Block Q. and lots one (1), two (2), Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also all the rights, interest, title, claims and demands—every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said City, amendatory thereof and supplementary thereto, and also under a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an ordinance of the

396 Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of Water for domestic, and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha, and approved by the Mayor of said city on the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence, entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said Company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys, and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of

them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the City of Omaha, the City of South Omaha and the City of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the

397 American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may rise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

And all other land in the County of Douglas and State of Nebraska, and all the right, title and interest therein whereof the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

All of the above described property lying and being in Douglas County, State and District of Nebraska.

Above described property sold for \$4,000,000.00.

SCHEDULE "A."

Amount due Farmers' Loan and Trust Company on Bonds and Coupons.....	\$4,162,180.97
Amount due Farmers' Loan and Trust Company on detached coupons.....	102,403.50
Amount due New England Water Works Company on bonds and coupons.....	2,372.15
Amount due Mechanics National Bank on Bonds and Coupons	7,752.68
There is due the Omaha National Bank on detached coupons	11,982.36
Amount due C. H. Venner Company on detached coupons	7,995.53
Amount due C. H. Venner, Trustee, on detached coupons	37,065.11

Amount due American Exchange National Bank of New York on detached coupons.....	31,009.49
Amount due John T. Christie, on detached coupons.....	6,195.58
Amount due M. D. Schoomaker, on detached coupons	3,158.54
Amount due National Bank of the Republic of Boston, on detached coupons.....	42,204.38
Due Nat'l Bank of Redemption.....	12,379.02
Circuit Court costs.....	1,958.86
Master's fees and Disbursements.....	40,306.00
Total	\$4,468,964.17

E. S. DUNDY, JR.,
Master in Chancery.

398 Attached to said Master's report of sale, are papers, in words and figures following, to-wit:

At a session of the Circuit Court of the United States for the District of Nebraska continued and held pursuant to adjournment, at the United States Court Room, in the City of Omaha, on the 24th day of June, 1895, the Honorable John A. Riner and Elmer S. Dundy, Judges being present and presiding in said Court the following among other proceedings were had and done, to-wit:

(Decree, omitted as it appears elsewhere in this record.)

Found on page 1270.

(Order making decree of Circuit Court of Appeals the decree of this Court omitted.)

(Found on page 614.)

In the Circuit Court of the United States, District of Nebraska.

No. 96. Doc. "Q."

THE FARMERS' LOAN & TRUST COMPANY, Complainant,
 vs.

THE AMERICAN WATER WORKS COMPANY et al., Respondents.

Appraisement.

The undersigned, E. S. Dundy, Jr., one of the Masters in Chancery of the Circuit Court of the United States for the District of Nebraska, and M. H. Collins and V. G. Lantry, two disinterested freeholders, residents of Douglas County, State and District of Nebraska, the said freeholders being duly sworn by said Master to impartially appraise at its cash value the following described property directed to be sold by virtue of a decree issued out of the Circuit Court of the United States in the above entitled cause do upon our oaths appraise said property at its real value in money, after deducting all prior liens thereon.

That piece or parcel of land known and described as the north fifty (50) feet of lot eighteen (18) and the west ten (10) feet of the north fifty (50) feet of lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Douglas County, at.....	\$3,000.00
Less taxes	14.98
	<hr/>
	\$2,985.02

And also that other certain parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast one-quarter of section seven (7) in township fifteen (15) north of Range thirteen (13) east of the Sixth Principal Meridian.

At	\$8,750.00
Less Taxes,	97.90
	<hr/>
	\$8,652.10

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way line to the north line of Washington Street in said City; thence easterly along the north line of said Washington Street to the east line of Mill Street in said City; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west — of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also those two other pieces or parcels of land described as follows: Lots seven (7) and ten (10) in block seventeen (17) of Kountze's and Ruth's addition to the City of Omaha, according to the plat of said Addition recorded in the registrar's office.

Also that other parcel of land known at Lot B, in Reservoir 400 addition to the said City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and eight (8) in Block Q, and lots one (1) two (2) Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof, recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southerly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, in any wise whatever arising under *under* a certain ordinance of the City of Omaha, known as Ordinance 423, entitled An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said City, amendatory thereof and supplementary thereto, and also under a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County,

Nebraska, for the sale of water for domestic and fire purposes 401 to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha, and approved by the Mayor of said city on the 17th of October, 1887. Also all rights of said

company under an ordinance of the City of Florence, entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said Company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the City of Omaha, the City of South Omaha and the City of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water — Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

And all other lands in the County of Douglas and State of Nebraska, and all the right, title and interest therein whereof the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

All of the above described property lying and being in Douglas County, State and District of Nebraska.

At	\$5,500,000.00	
Less Taxes	21,168.51	
		\$5,478,831.49
Less \$400,000.00 first mortgage.....		400,000.00
		<hr/> \$5,078,831.49

Given under our hands this 15 day of April, 1896.

E. S. DUNDY, JR.,
Master in Chancery of the Circuit Court of the
United States for the District of Nebraska.
 W. H. COLLINS,
 V. G. LANTRY, *Appraisers.*

In the Circuit Court of the United States, District of Nebraska.

THE FARMERS' LOAN & TRUST COMPANY

v.

THE AMERICAN WATER WORKS COMPANY et al.

You will please take notice that the holders of bonds to the number of three million five hundred and fifty-four thousand dollars (\$3,554,000) have joined in a request to the plaintiff herein, the Farmers' Loan & Trust Company, to bid in the premises described in the decree of foreclosure herein in trust for them.

Dated Omaha, May 20, 1896.

To E. S. Dundy, Jr., Master in Chancery of the Circuit
 403 Court of the United States for the District of Nebraska.

ERNST THALMANN,
 GERALD L. HOYT,
 WINTHROP SMITH,
 ROSEWELL G. RALSTON,
 FREDERICK STRAUSS,
 WM. R. NICHOLSON,
 THEODORE C. WOODBURY,
Bondholders' Committee.

Master's Sale.

In the Circuit Court of the United States for the District of Nebraska.
 In Chancery.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,

vs.

THE AMERICAN WATER WORKS COMPANY et al., Defendants.

Foreclosure of Mortgage.

Public notice is hereby given that in pursuance and by virtue of a decree entered in the above cause on the 24th day of June, 1895,

as amended by decree of the United States Circuit Court of Appeals for the Eighth Circuit, dated March 16, 1896, I, E. S. Dundy, Jr., Master in Chancery of the Circuit Court of the United States for the District of Nebraska, will, on the 20th day of May, 1896, at the hour of ten o'clock in the forenoon of said day, at the east door of the Douglas County Court House building, in the City of Omaha, Douglas County, State and District of Nebraska, sell at auction the following described property to-wit:

"All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. — & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way line to the North line of Washington Street in said City; thence easterly along the north line of said Washington Street to the east line of
404 Mill Street in said City; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River; in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number- Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnum and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also that other piece or parcel of land known and described as the North fifty (50) feet of Lot Eighteen (18) and the West ten (10) feet of the North fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha according to the plat of said Addition recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B, in Reservoir Addition to the City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q, and lots one (1) two (2) Five (5) Six (6) in Block Three

Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southerly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning:

Also those two other pieces or parcels of land described as follows:

Lots seven (7) and ten (10) in block seventeen (17) of Kountze's and Ruth's addition to the City of Omaha, according to a plat of said addition recorded in said Registrar's office; and

Also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast quarter of section (7) in township fifteen (15) north of range thirteen (13) east of the sixth principal meridian.

And all other land in the County of Douglas and State of Nebraska and all the right, title and interest therein, whereof the American Water Works Company of Illinois and the American Water Works Company of New Jersey, defendants in this suit, or either of them, is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said City, amendatory thereof and supplementary thereto, and also under a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke, under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of Water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois for the term of seventeen

(17) years passed by the Mayor and Council of said City of South Omaha, and approved by the Mayor of said city on the 17th 406 of October, 1887. Also all rights of said company under an ordinance of the City of Florence, entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of the City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said Company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys, and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the City of Omaha, the City of South Omaha and the City of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

407 All of above described property situated in Douglas County, State and District of Nebraska.

Any person bidding at such sale to whom the master may strike the premises off, shall at once pay to said master the sum of fifty thousand dollars upon his bid. Should any person bidding at such sale to whom the premises may be struck off, neglect or fail, pend-

ing said sale to pay to said master the said sum, the said master may at once again offer the premises for sale and proceed as if such bid had not been made. The remainder of the purchase price shall be paid in cash or in bonds and coupons secured by the mortgage foreclosed in said cause, the said bonds and coupons to be received in payment of such bid for an amount equal to the sum of money which the holders of said bonds and coupons would be entitled to receive on account thereof on distribution of the purchase price bid at such sale.

Dated, Omaha, April 17, 1896.

E. S. DUNDY, JR.,

*Master in Chancery of the United States
Circuit Court for the District of Nebraska.*

TURNER, McCLURE & RALSTON,

22 William Street, New York, Complainant's Solicitors.

R. S. HALL,

J. M. WOOLWORTH,

Omaha, Neb.

STATE OF NEW YORK,

City and County of New York, ss:

Morris Van Vliet, being duly sworn, says, that he is the foreman of the publisher of "The Evening Post," a daily newspaper printed and published in the city of New York; that the notice hereto annexed has been regularly published in said "The Evening Post" six times, viz, April 17, 24, May 1, 8, 15 and 18, 1896.

MORRIS VANVLIET.

Sworn to before me this 18th day of May, 1886.

[SEAL.]

THOMAS Z. CLIFFORD,
Notary Public, New York County.

Omaha Daily and Weekly Bee.

Master's Sale.

In the Circuit Court of the United States for the District of Nebraska
In Chancery.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,

vs.

THE AMERICAN WATER WORKS COMPANY et al., Defendants.

408

Foreclosure of Mortgage.

Public notice is hereby given that in pursuance and by virtue of a decree entered in the above cause on the 24th day of June, 1895, as amended by decree of the United States Circuit Court of Appeals for the Eighth Circuit, dated March 16, 1896, I, E. S. Dundy, Jr., Master in Chancery of the Circuit Court of the United States for

the District of Nebraska, will, on the 20th day of May, 1896, at the hour of ten o'clock in the forenoon of said day, at the east door of the Douglas County Court House building, in the City of Omaha, Douglas County, State and District of Nebraska, sell at auction the following described property to-wit:

"All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way line to the north line of Washington Street in said City; thence easterly along the north line of said Washington Street to the east line of Mill Street in said city; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

409 Also that other piece or parcel of land known and described as the North fifty (50) feet of Lot Eighteen (18) and the West ten (10) feet of the North fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B, in Reservoir Addition to the said City of Omaha according to the plat of said addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1) two (2) three (3) four (4) five (5) six (6) seven (7) and eight (8) in Block Q, and Lots one (1) two (2) five (5) and six (6) in Block three-hundred and twenty-eight (328) in the City of Omaha according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said City of Omaha described as follows:

Beginning at a point on the south line of Burt Street at the North-east corner of Block three hundred and sixty (360) in said city; thence north to a point corresponding with the south line of the alley in Blocks three hundred and twenty-eight (328) and three hundred and twenty-nine (329) in said City; thence East to the bank of the Missouri River at low-water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the South Line of Burt Street, produced east from its present termination; thence West to the place of beginning.

"Also those two other pieces or parcels of land described as follows:

Lots seven (7) and ten (10) in block seventeen (17) of Kountze's and Ruth's addition to the City of Omaha, according to a plat of said addition recorded in said Registrar's office; and

Also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast one-quarter of section seven (7) in township fifteen (15) north of range thirteen (13) east of the sixth principal meridian.

And all other land in the County of Douglas and State of Nebraska and all the right, title, and interest therein, whereof the American Water Works Company of Illinois and the American Water Works Company of New Jersey, defendants in this
410 suit, or either of them, is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said City, amendatory thereof and supplementary thereto, and also under a certain contract bearing date of the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha, and approved by the Mayor of said city on the 17th of

October, 1887. Also all rights of said company under an ordinance of the City of Florence, entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said Company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys, and public places of the cities of Omaha, South Omaha, and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of

Illinois, and the American Water Works Company of New
411 Jersey, or either of them, under and by virtue of the several ordinances and contracts each and every of them heretofore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the City of Omaha, the City of South Omaha and the City of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

All of above described property situated in Douglas County, State and District of Nebraska.

Any person bidding at such sale to whom the master may strike the premises off, shall at once pay to said master the sum of fifty thousand dollars upon his bid. Should any person bidding at such sale to whom the premises may be struck off, neglect or fail, pending said sale to pay to the said master the said sum, the said master may at once again offer the premises for sale and proceed as if such

bid had not been made. The remainder of the purchase price shall be paid in cash or in bonds and coupons secured by the mortgages foreclosed in said cause; the said bonds and coupons to be received in payment of such bid for an amount equal to the sum of money which the holders of said bonds and coupons would be entitled to receive on account thereof on distribution of the purchase price bid at such sale.

412

Dated, Omaha, April 17, 1896.

E. S. DUNDY, JR.,

*Master in Chancery of the United States Circuit
Court for the District of Nebraska.*

TURNER, McCLURE & RALSTON,

22 William Street, New York, Complainant's Solicitors.

R. S. HALL,

J. M. WOOLWORTH,

Omaha, Neb.

STATE OF NEBRASKA,

County of Douglas, ss:

Robert Hunter, being duly sworn, deposes and says that he is advertising clerk of the Omaha Daily Bee, a legal newspaper having a bona fide circulation in excess of 200 copies, printed at Omaha, in said County of Douglas, for more than fifty-two weeks last past; that the printed notice hereto attached was published in the said Daily Bee newspaper on the following dates, to-wit: April 17th, April 24th, May 8th, May 15th, and May 18th, 1896.

That said newspaper was, during that time in general circulation in the County of Douglas and State of Nebraska.

(Signed)

ROBERT HUNTER.

Subscribed and sworn to before me this 18th day of May, 1896.

[SEAL.]

F. J. SUTCLIFFE,

Notary Public.

Printer's Fee \$91.00

Affidavit25

\$91.25 net

Master's Sale.

In the Circuit Court of the United States for the District of Nebraska.
In Chancery.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.

THE AMERICAN WATER WORKS COMPANY et al., Defendants.

Foreclosure of Mortgage.

Public notice is hereby given that in pursuance and by virtue of a decree entered in the above cause on the 24th day of June, 1895,

as amended by decree of the United States Circuit Court of Appeals for the Eighth Circuit, dated March 16, 1896, I, E. S. Dundy, Jr., Master in Chancery of the Circuit Court, of the United States for the District of Nebraska, will on the 20th day of May, 1896, at the hour of ten o'clock in the forenoon of said day, at the east door of the Douglas County Court House building, in the City of Omaha, Douglas County, State and District of Nebraska, sell at auction the following described property, to-wit:

All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said City, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way line to the North line of Washington Street in said city; thence easterly along the north line of said Washington Street to the east line of Mill Street in said city; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also that other piece or parcel of land known and described as the north fifty (50) feet of lot eighteen (18) and the west ten (10)

feet of the north fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land as Lot B. in Reservoir Addition to the said City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those parcels of land known as lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q. and lots one (1) Two (2) Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha,

according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the City of Omaha, according to a plat of said Addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one half of the northeast one quarter of section (7) in township fifteen (15) north of Range Thirteen (13) east of the Sixth Principal Meridian. And all other land in the County of Douglas and State of Nebraska, and all the right, title and interest therein, whereof the American Water Works Company of Illinois and the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said city, amendatory thereof and supplementary thereto, and also under a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an Ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the city of South Omaha, Douglas County, Nebraska, for the sale of Water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha; and approved by the Mayor of said city on

the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and

416 demands of every name and nature however arising, of either of said companies against the city of Omaha, the city of South Omaha and the city of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereinafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

All of above described property situated in Douglas County, State and District of Nebraska.

Any person bidding at such sale to whom the master may strike the premises off, shall at once pay to said master the sum of fifty thousand dollars upon his bid. Should any person bidding at such sale to whom the premises may be struck off, neglect or fail, pending said sale to pay to said master the said sum, the said master may at once again offer the premises for sale and proceed as if such bid

had not been made. The remainder of the purchase price shall be paid in cash or in bonds and coupons secured by the mortgages foreclosed in said cause, the said bonds and coupons to be received in payment of such bid for an amount equal to the sum of money which the holders of said bonds and coupons would be entitled to receive on account thereof on distribution of the purchase price bid at such sale.

Dated, Omaha, April 17, 1896.

E. S. DUNDY, JR.,
Master in Chancery of the United States Circuit
Court for the District of Nebraska.

TURNER, McCLURE & RALSTON,
22 Williams Street, New York.

R. S. HALL,
J. M. WOOLWORTH,
Omaha, Neb., Complainant's Solicitors.

417 STATE OF NEBRASKA,
County of Douglas, ss:

Charles L. Kendrick, being duly sworn, deposes and says, that he is advertising clerk of the Omaha Daily World-Herald, a legal newspaper having a bona fide circulation in excess of 200 copies, printed at Omaha, in said County of Douglas, for more than fifty-two weeks last past, that the printed notice hereto attached was published in the said Daily World-Herald newspaper for six consecutive weeks on the following dates, to-wit: April 17th, April 24th, May 1st, May 8th, May 15th and May 18th, 1896.

The said newspaper was, during that time in general circulation in the County of Douglas and State of Nebraska.

(Signed) CHARLES L. KENDRICK.

Subscribed and sworn to before me this 20th day of May, 1896.
[SEAL.] W. H. WILBER,

Notary Public.

Printer's fees	\$94.50
Affidavit25

\$94.75

Endorsed: Filed May 22, 1896. Elmer D. Frank, Clerk.

United States Circuit Court, District of Nebraska.

96-Q.

FARMERS' LOAN & TRUST COMPANY, Plaintiff,

vs.

THE AMERICAN WATER WORKS COMPANY et al., Defendants.

Order.

Now on this day this cause came on to be heard on the exceptions filed to the Master's report of sale herein and the motion to confirm the sale, and the Court being fully advised in the premises, it is

Ordered that the exceptions to the Master's report of sale be and the same are hereby overruled, and that the said sale be and the same is hereby confirmed, to which ruling the defendant- except, the question of the compensation of the Master, however, being hereby expressly reserved. It is further

Ordered that the Farmers' Loan & Trust Company, the bidder herein, have fifteen days from this date within which to comply with its said bid and to make the same good, with
418 leave, however, if it be necessary to apply for further extension of said time, and upon compliance with the bid as herein provided for, the Master is directed forthwith to report the facts to the court and to ask further instructions regarding execution and delivery of deed.

May 28th, 1896.

O. P. SHIRAS, *Judge.*

United States Circuit Court in and for the District of Nebraska.

96-Q, Doc. "Q." No. 96.

FARMERS' LOAN & TRUST COMPANY, Plaintiff,

vs.

THE AMERICAN WATER WORKS Co. et al., Defendants.

This cause coming on for hearing upon the application of the Farmers' Loan & Trust Company for an order directing the Receivers in the above entitled case to turn over the property described in the decree herein to the purchaser or its legal representative.

And it appearing to the Court that the property so ordered sold by said decree was purchased by the Farmers' Loan & Trust Company,

And it appearing further that the said Farmers' Loan & Trust Company has fully complied with its bid, and that the Master Commissioner has, under the direction of this Court, made a deed of all of said property to said Farmers' Loan & Trust Company.

And it appearing further that said Farmers' Loan & Trust Company is now entitled to full possession and control of the property so purchased. It is therefore

Ordered that Ellis L. Bierbower and Alonzo B. Hunt, Receivers herein, be and they are hereby instructed and directed to turn over to the Farmers' Loan & Trust Co., or its proper representative, all of the property purchased by the Farmers' Loan & Trust Company, which property is fully described in the decree entered in this case and in the deed of the Master Commissioner to said Farmers' Loan & Trust Company; and to give to said Water Company full and complete control of all of said property, excepting only the money now in the hands of said Receivers, or due to them, and with respect to said money the said Receivers are hereby directed to retain the same in their possession until they make final report of their receivership to this Court, and until the further order of this Court.

ELMER S. DUNDY, *Judge.*

To this order, Def'ts' att'y excepts.
8 July, 1896.

ELMER S. DUNDY, *Judge.*

419 In the Circuit Court of the United States for the District of
Nebraska.

96-Q.

FARMERS' LOAN & TRUST COMPANY, Complainant,
vs.
AMERICAN WATER WORKS COMPANY OF ILLINOIS et al., Respond-
ents.

Order.

Now on this day this cause came on to be heard upon the applica-
tion of the Complainant herein for a deed to the property described
in the Order of sale herein, and it appearing that the bidder has in
all respects complied with its bid, it is

Ordered that the Master forthwith execute a deed to the Farmers'
Loan & Trust Company, Trustee, for the property, described in the
Report of Sale and in controversy in this action.

16 July, 1896.

ELMER S. DUNDY, *Judge.*

Final Report.

To the Judges of the Circuit Court of the United States for the Dis-
trict of Nebraska:

The undersigned, Master in Chancery of the Circuit Court of the
United States for the District of Nebraska, would respectfully report
that in pursuance of a Decree of the Circuit Court of the United
States for said District, rendered at the May Term, A. D. 1896, in
case of The Farmers' Loan & Trust Company, against The American
Water Works Company et al., to foreclose Mortgage; I did on the
sixteenth day of July, 1896, execute and deliver to The Farmers'
Loan & Trust Company, Trustee, a deed of Conveyance, duly ac-
knowledgeed, for the following described real estate, lying and being
in Douglas County, Nebraska, to-wit:

All those several pieces and parcels of land known and described as
follows:

That certain piece or parcel of land described as follows: Begin-
ning at the intersection of the west bank of the Missouri River with
the south line of Bridge Street in the City of Florence, Douglas
County, Nebraska, and running thence westerly along the south line
of said Bridge Street, to the east line of Fifth Street in said City,
thence southerly along the east line of said Fifth Street, to the
right of way of the Chicago, St. Paul & Minneapolis Railroad; thence
southerly, along the east line of said right of way, to the south line

of State Street in said City; thence easterly along the south line of said State Street, to the east line of said railroad right of way, south of State Street; thence southerly along said right of way to the north line of Washington Street in said city; thence easterly along the north line of said Washington Street to the east line of Mill Street in said city; thence northerly along the east line of said Mill Street to the northwest corner of Block Two Hundred and Fifty-eight (258) in said city; thence easterly along the north line of said Block Two Hundred and Fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as Blocks Number- Two (2) One Hundred and Twenty-six (126) and Two Hundred and Sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said City.

Also that other piece or parcel of land known and described as the north fifty (50) feet of Lot eighteen (18) and the west ten (10) feet of the north fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B, in Reservoir Addition to the said City of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q, and lots one (1) Two (2) Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said city of Omaha described as follows:

Beginning at a point on the south line of Burt Street, at the northeast corner of Block Three Hundred and Sixty (360) in said City; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and

Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southeasterly direction along the bank of the said Missouri River to a point corresponding with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) of Kountze's and Ruth's Addition to the City of Omaha, according to a plat of said Addition recorded in the said Registrar's office; and

also that certain other parcel of land known and described as the west twenty-five acres of the south one-half of the northeast one-quarter of section Seven (7) in township fifteen (15) north of Range Thirteen (13) east of the Sixth Principal Meridian. And all other land in the County of Douglas and State of Nebraska, and all the right, title, and interest therein, whereof the American Water Works Company of Illinois and the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

Also all the rights interest, title, claims and demands of every name and nature which have in any wise *came* to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled, "An ordinance to authorize and procure the construction and maintenance of water works in the City of Omaha, State of Nebraska, passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all other Ordinances of said city, amendatory thereof and supplementary thereto, and also under a certain contract bearing date the 20th of July, 1880, between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the rights of the said Locke under which contract had come to the Water Works Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an Ordinance of the Mayor and Council of the City of South Omaha known as Ordinance Number 29, entitled, "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the city of South Omaha, Douglas County, Nebraska, for the sale of Water for domestic and fire purposes to the American Water Works Company, of Chicago, Illinois, for the term of seventeen (17) years passed by the Mayor and Council of said City of South Omaha; and approved by the Mayor of said city on the 17th of October, 1887." Also all rights of said

422 company under an ordinance of the City of Florence, entitled, "An Ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said City of Florence, and approved by the Mayor of said City on the 13th of August, 1889, and the contract in pursuance thereof between said city and said company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the County of Douglas in the State of Nebraska, and all the right, title and interest which has at any time heretofore been vested in, or held or enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise acquired, held or enjoyed by either of said companies;

and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the city of Omaha, the city of South Omaha and the city of Florence, any or either of them, whether such debts, dues, demands, rentals and claims have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the Receivers of said Water Company, or the registry of this Court, or which may hereafter come to the hands of said receivers, or come into the registry of this Court, subject nevertheless to such orders in respect thereof, as this Court may have heretofore made, or may hereafter make, in respect to said moneys, as in this decree provided. It being the purpose and intent of the Court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them, in the County of Douglas, and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof, and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

423 "All of above described property situated in Douglas County, State and District of Nebraska." The same having been heretofore, to-wit: On the 20th day of May, A. D. 1896, purchased by The Farmers' Loan & Trust Company, Trustee, at a sale made by me as Master in Chancery.

Dated at Omaha, this 16th day of July, A. D. 1896.

E. S. DUNDY, JR.,
Master in Chancery.

Endorsed: Filed Aug. 5, 1896. Elmer D. Frank, Clerk.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

No. 74, Docket "X."

OMAHA WATER COMPANY, Complainant,
vs.
THE CITY OF OMAHA, Defendant.

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify that the foregoing record marked Volume I, is a part of the record of said cause, and is the Volume referred to as Volume I. in my said Certificate found on page 1326, attached to Volume II.

Witness my hand and the Seal of said Court at Omaha in said District, this — day of —.

[Seal United States Circuit Court, Omaha Division, District of Nebraska.]

GEO. H. THUMMEL, *Clerk.*

Filed Aug. 10, 1907.

JOHN D. JORDAN, *Clerk.*

Thereupon afterwards, to-wit: There was offered in evidence in the case of the Omaha Water Company vs. City of Omaha No. 74 Docket "X", a stipulation filed March 24, 1897, in the case of City of Omaha, vs. Farmers' Loan & Trust Company No. 24 Docket "S", which said Stipulation is in words and figures following, to-wit:

(Other papers in Case No. 24 Docket "S", attached as Exhibits to Testimony in No. 209 W.)

In the Circuit Court of the United States, District of Nebraska.

No. 24, Docket "S."

THE CITY OF OMAHA, Plaintiff,

vs.

THE FARMERS' LOAN & TRUST COMPANY et al., Defendants.

424

Stipulation.

It is hereby stipulated by and between the parties to the above entitled cause that the issues be perfected in said cause without delay, and to that end it is stipulated and agreed that an order shall be made herein making the Omaha Water Company a defendant to the bill and cross-bill, the City of Omaha and The American Water Works Company to have leave to file amendments respectively to the bill and cross-bill within five days from this date making the Omaha Water Company a defendant, and that the Farmers' Loan & Trust Company and the Omaha Water Company shall make answer respectively to said bill and cross-bill within five days thereafter.

Dated March 22nd, 1887.

W. J. CONNELL,
Counsel for City of Omaha.

JNO. L. WEBSTER,

Counsel for American Water Works Co.

R. S. HALL,

Counsel for Farmers' Loan & Trust Co.

R. S. HALL,

Counsel for Omaha Water Company.

Endorsed: Filed Mar. 24, 1897. Oscar B. Hillis, Clerk.

Thereupon afterwards, to-wit: there was offered in evidence in the case of Omaha Water Company vs. City of Omaha, No. 74 Docket

"X", the Bill in Equity filed in the case of The Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., No. 209, Docket "W", which said Bill in Equity is in words and figures following, to-wit:

In the Circuit Court of the United States, Within and for the District of Nebraska.

THE WATER BOARD OF THE CITY OF OMAHA and the CITY OF OMAHA,
Complainants,

vs.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG, and
the OMAHA WATER COMPANY, a Corporation, Defendants.

Bill in Equity.

To the Honorable, The Judges of the Circuit Court of the United States for the District of Nebraska, sitting in Equity:

The Water Board of the City of Omaha, constituted and
425 composed of the following named persons: James E. Boyd, R. Beecher Howell, A. H. Hipple, Milton Barlow, John F. Coad and Isaac E. Congdon, each and severally being residents and citizens of the State of Nebraska and of the City of Omaha in Douglas County in said state, being duly organized, authorized and empowered under and by virtue of the laws of the state of Nebraska to sue and be sued in the name of the Water Board of the City of Omaha, and a citizen and resident of the state of Nebraska, and the City of Omaha, being a city of the metropolitan class, created and existing under and by virtue of the laws of the state of Nebraska, and a citizen of the said state of Nebraska, presents this, its Bill of Complaint against Daniel W. Mead, a resident and citizen of Chicago in the County of Cook and state of Illinois, John W. Alvord, a citizen and resident of the City of Chicago in the County of Cook and state of Illinois, and George H. Benzenberg, a citizen and resident of the City of Milwaukee in the state of Wisconsin, and the Omaha Water Company, a corporation created by, and organized and existing under the laws of the state of Maine, and a citizen and resident of said state of Maine.

And thereupon your orators complain and say:

I.

That the City of Omaha, your orator, is a corporation under the corporate name of the City of Omaha, duly created, organized and existing under the laws of the state of Nebraska under and by virtue of the various acts of the legislature of said state providing for the incorporation of metropolitan cities and defining, regulating and prescribing their duties, powers and government, and that the before mentioned James E. Boyd, R. Beecher Howell, A. H. Hipple, Milton Barlow, John F. Coad and Isaac E. Congdon, are each and severally citizens and residents of the City of Omaha in the state of Ne-

braska and constitute the members of the Water Board of the City of Omaha, which said Water Board of the City of Omaha is a citizen of the state of Nebraska, and is created, acting and existing under and by virtue of the laws of the state of Nebraska, with power to sue and be sued by and under the name of the Water Board of the City of Omaha, and with the powers, duties and authority as defined by the statutes of the state of Nebraska, and with power particularly to regulate and fix water rates and fire hydrant rentals; to provide for and order the extension of water mains; to determine the number and designate the location of all fire hydrants, to audit, pass upon, and pay or reject any and all bills for water or fire hydrants furnished such city; to make, modify and terminate on behalf of said city, all contracts for the supply of water to said city for domestic, public or fire purposes; to act on behalf of such city in all matters pertaining to the purchase or acquisition of water plants of any person, co-partnership or corporation supplying the City of Omaha or any portion thereof with water for domestic, mechanical, public or fire purposes under the powers granted by the charter of such city, or by virtue of any right inuring to such city through contract or otherwise; the general supervision of any resulting appraisement in the purchase or acquisition of water works for said city; the acceptance or rejection of any award resulting from any such appraisement; and of all other negotiations connected with or pertaining to the acquisition of said water plant. And said board is further by law particularly given power and authority to maintain and defend all suits at law or in equity growing out of the transactions of the said board of appraisers, or any matter pertaining to the water supply of said city, or to the construction, operation, maintenance or acquisition of any water plant by such city.

II.

That the Omaha Water Company, defendant herein, is a corporation organized and existing under and by virtue of the laws of the state of Maine for the purpose of owning and operating water works, and particularly water works in the city of Omaha, and said Omaha Water Company is a citizen and resident of the state of Maine.

That the said defendants, Daniel W. Mead and John W. Alvord are each and severally citizens and residents of Cook County in the state of Illinois, and that George Benzenberg defendant, is a resident and citizen of the state of Wisconsin residing at Milwaukee in said state, and that the said defendants, Daniel W. Mead, John W. Alvord and George H. Benzenberg are acting as a board of appraisers of the water works belonging to the Omaha Water Company, defendant, as hereinafter more particularly set forth.

III.

That the amount in controversy in this action exceeds the sum of two thousand dollars, exclusive of interest and costs.

IV.

That in 1879 the legislature of the state of Nebraska duly passed an act entitled "An act to amend section 15 of an act entitled an act to incorporate cities of the first class, approved March 28, 1873," wherein it was provided:

"Section 15. The mayor and council of each city created or
427 governed by this act shall have the care, management and control of the city and its property and finances, and shall have power to pass any and all ordinances not repugnant to the constitution and laws of this state, and such ordinances to alter, modify or repeal, and shall have power.

* * * * *

27th. To erect, construct and maintain water works either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such water works, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of such water-works; compensation for such appropriation to be made as is provided by section fifty-four (54) of said act as now amended and in force; and the mayor and council of each city, created or governed by said act, shall have power to contract with and procure individuals or corporations to construct and maintain water works on such terms and under such regulations as may be agreed upon."

That at said date the City of Omaha was a city of the first class and remained a city of the first class until 1887, when it was incorporated and became a city of the metropolitan class and succeeded to all of the property and contract rights of the City of Omaha as a city of the first class.

V.

That said City of Omaha, in accordance with the power conferred upon it by the acts of the legislature of the state of Nebraska, for the purpose of supplying the City of Omaha and the inhabitants thereof with water, secured J. D. Cook, an engineer to make report upon the plans and advisability of constructing water works, either by the city itself, or by some person or association of persons for the said city, and said J. D. Cook did on the 25th day of May, 1880, make and file a report with the City Clerk of the City of Omaha, and on the 31st day of May 1880 did make and file a supplemental report with said City Clerk setting forth the plans and details for the construction of water works, either by the City of Omaha or by some person or association of persons formed for that purpose, which said report was approved by the city council of the City of Omaha on the 8th day of June, 1880, and which said report is fully set forth in the compiled ordinances of the City of Omaha for the year 1890 at pages 576 and 596 thereof, to which your orators beg leave to refer, and make part of this bill.

428

VI.

That thereafter the City of Omaha passed an ordinance known as Ordinance No. 423 entitled "An Ordinance to authorize and procure the construction and maintenance of a water works in the City of Omaha and state of Nebraska," in which it was provided, among other things, as follows:

"Sec. 14. The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council one by the water works company and these two to select the third; provided, that nothing shall be paid for the unexpired franchise of said company."

The said Ordinance No. 423 will be found in the Compiled Ordinances of the City of Omaha for the year 1890 on pages 596 and 603, to which your orators beg leave to refer, and make part of this bill.

VII.

That thereafter the said city council of the City of Omaha passed Ordinances Nos. 430 and 445 amending said Ordinance No. 423, but that Section 14 of Ordinance No. 423 was not changed. Ordinances Nos. 430 and 445 are found in the Compiled Ordinances of the City of Omaha of 1890 on pages 603 and 607 respectively, and to which your orators beg leave to refer, and make part of this bill.

VIII.

That thereafter, to-wit: on the 20th day of July, 1880, under and in pursuance of the provisions of Ordinance No. 423 and the amendatory ordinances thereof heretofore described, an ordinance and contract was entered into by and between the City of Omaha and Sidney E. Locke, whereby the said Sidney E. Locke did undertake to construct water works for the supplying of the said City of Omaha and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes under the terms and conditions as set forth in Ordinance No. 423, which said contract will be found in the Compiled Ordinances of the City of Omaha for 1890 on pages 605 to 607, to which your orators beg leave to refer, and make part of this bill.

IX.

That thereafter there was constructed in the City of Omaha and adjacent thereto by the said Sidney E. Locke and his assigns, a water works plant for the purpose of supplying the City of Omaha
429 and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes, and that the said successors and assigns of the rights of the said Sidney E. Locke under said contract did, in addition to constructing a water works plant necessary for the purpose of supplying the City of Omaha and the citizens and inhabitants thereof with water, erect and construct

and attach to said water works so constructed under the terms of the contract with the City of Omaha, certain pipe systems and connections for the purpose of supplying various other municipalities lying near or adjacent to the City of Omaha, to-wit: South Omaha, Florence, East Omaha, Benson and Dundee, and that the said defendant, the Omaha Water Company by means of various and sundry transfers, has become and is the owner of the water works constructed and operated under the said ordinance No. 423, and ordinances amendatory thereof for the purpose of supplying the City of Omaha and the citizens and inhabitants thereof with water; and that the said Omaha Water Company has also by means of various conveyances, become the owner and is engaged in the operation of the pipe systems and connections heretofore described, which are situated in South Omaha, Florence, East Omaha, Benson and Dundee. But your orators aver to the court that the various pipe systems and connections owned and operated by the said Omaha Water Company in the municipalities of South Omaha, East Omaha, Benson and Dundee are not in any way necessary or appurtenant to the water works which are useful and necessary for supplying the City of Omaha or the citizens or inhabitants thereof with water, but that said pipe systems and connections as constructed, purchased and owned by the Omaha Water Company in said various municipalities of South Omaha, East Omaha, Benson and Dundee were each and severally erected by and in accordance with the terms of certain contracts between the said Omaha Water Company and its predecessors with the said municipalities of South Omaha, East Omaha, Benson and Dundee, and were not erected and are not operated by, with or under the authority of the City of Omaha, or by virtue of any contract with the said City of Omaha, or rights given to said Sidney E. Locke and his successors under the ordinances authorizing the construction of water works for the City of Omaha and its citizens and inhabitants.

Your orators further show to the court that the Ordinance No. 423 provided only for the construction and maintenance of water works in the City of Omaha, and that Section 1 thereof describing the purpose of said ordinance is as follows:

430 "SECTION 1. Any person, company, corporation or association who shall erect, construct and maintain water works upon the principles of a combined system of direct pressure and reservoir, of the capacity, magnitude and character hereinafter described and as more fully and at large appears in the record and appendix hereto of J. D. Cook, engineer, filed in the office of the city clerk of Omaha on the 25th and 31st days of May, A. D. 1880, and as finally approved by the city council of said city on the 8th day of June, A. D. 1880, within and adjacent to the City of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said city and citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes, shall have the right of way along, upon and under the public streets, alleys, public squares and public places of said city for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during

the time any such person, company, corporation or association, or their assigns, shall maintain and operate any such water works, and while constructing the same, upon the terms and conditions herein-after named."

Your orators further aver that at the time of the passage of said ordinance the municipalities of South Omaha, Benson, Dundee and Florence were not in existence, and that it was not contemplated that the said Sidney E. Locke or any other association of persons should construct water works under said ordinance outside of the City of Omaha, and that the report of J. D. Cook referred to in said ordinance contemplated and provided only for the erection of water works for and in the City of Omaha.

X.

Your orators further show to the court that the said water works were accepted by the City of Omaha on September 4, 1883, by an ordinance known as Ordinance No. 618 said Ordinance being set forth in the Compiled Ordinances of the City of Omaha for the year 1890 on page 610, to which your orators beg leave to refer, which water works so accepted included only the water works within the City of Omaha.

XI.

Your orators further show to the court that afterwards, to-wit: on the 2nd day of March, 1903, the City of Omaha in accordance with the provisions of law, did pass an ordinance known as Ordinance No. 5162, by which it was provided that the City of Omaha elect and determine to purchase the said water works constructed under and by virtue of, and in accordance with the terms of the Ordinance No. 423 before referred to, which said ordinance was in words and figures as follows, to-wit:

431

"Ordinance No. 5162.

"An Ordinance declaring that it is necessary and expedient for the City of Omaha to purchase the system of water works operated by the Omaha Water Company, and providing for notification to the water board and to said water company to each select one engineer as an appraiser to ascertain the valuation of said water works plant.

"Whereas, by the express terms of an act of the legislature of the State of Nebraska, providing in cities of the metropolitan class for the procedure in certain cases by the mayor and council in the acquisition of a municipal water plant, and for the creation of a water board, etc., approved February 2, 1903, it is made the duty of the mayor and council of the City of Omaha within thirty days after said act shall take effect to declare by ordinance that it is necessary and expedient for such city to construct or purchase (as the case may be) a system of water works; and

"Whereas, said act of the legislature declared an emergency existed for said act, and that the same should be of full force and effect from and after its passage and approval; therefore,

"Be it ordained by the City Council of the City of Omaha:

SECTION 1. That under and in pursuance of the provisions of said act of the legislature of the State of Nebraska to provide in cities of the metropolitan class for the procedure in certain cases by the mayor and council for the acquisition of a municipal water plant, and for the creation of a water board, etc., approved February 2, 1903, and as required by the provisions of said act and within thirty days of the taking effect of said act the mayor and council of said City of Omaha do hereby declare that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, and do elect and determine to purchase and acquire such water works plant by virtue of the rights inuring to said city and the grantors of said water company and as authorized and provided by section 14 of Ordinance No. 423.

SEC. 2. That immediately after the passage and approval of this ordinance, and as soon as the water board provided for in said act is appointed and organized, the said board be notified that for the purpose of ascertaining the appraised valuation of said water works plant as provided in said section 14 of ordinance No. 423, it is necessary to select and appoint one appraiser, thereby enabling said water board to propose for appointment by the council the name of one appraiser in accordance with the provisions of said act, and that the said
432 Omaha Water Company be also at once notified for the purpose hereinbefore stated, that it is required to also select one engineer; the two so selected to select a third engineer to the end that the appraised valuation at which the City of Omaha shall have the right to purchase said water works plant may be ascertained; and the city clerk is hereby authorized and directed to give such notification, attaching thereto certified copy of this ordinance.

SEC. 3. That this ordinance shall take effect and be in force from and after its passage.

Passed February 24, 1903.

[SEAL.]

W. H. ELBOURN,
City Clerk.

MYRON D. KARR,
President City Council.

Approved March 2, 1903.

FRANK E. MOORES, *Mayor."*

XII.

Your orators further show to the court that in accordance with the provisions of Ordinance No. 423 and the amendatory ordinances thereof, and in accordance with Ordinance No. 5162 electing and determining to purchase said water works under said option contained in Ordinance No. 423, the defendant, the Omaha Water Company, appointed George H. Benzenberg, one of the defendants herein, as an appraiser to estimate the value of said water works, and the complainant, the city of Omaha, did appoint John W. Alvord, one of the defendants herein, as its appraiser of said water works, and said appraisers so appointed did choose and select Daniel W. Mead, defendant herein, as the third engineer to appraise and estimate the value

of the water works plant necessary for the supplying of the City of Omaha and its citizens and inhabitants with water, and that said three appraisers are competent engineers and qualified to act under the terms of said ordinance No. 423 and the amendatory ordinances thereof.

XIII.

Your orators further show to the court that said appraisers did meet and organize as a board of appraisers of the Omaha water works on or about the 20th day of July, 1903, and that said Omaha Water Company and the said City of Omaha appeared before said board and did present and make such showing as to the properties of the 433 said Omaha Water Company as each of said parties desired, and that since said time the said appraisers have been considering and working upon their estimate of the value of said water works belonging to the Omaha Water Company.

XIV.

Your orators further represent to the court that said board of appraisers are without power or authority to determine any matters of law, and are without power or authority to subpoena before them witnesses, or to compel the production of books and papers in evidence before them, and that under the law there is no provision for any review of the award of said appraisers either by appeal or error to any of the courts of the state or of the United States, and that serious differences have arisen in and before said board involving questions of law and the construction of the contract under which the said appraisement is being made, and involving the question of the powers and duties of said board under said contract, and that the members of said board of appraisers are divided in their opinion upon the construction to be placed upon the said contract and upon the question as to what items of property should properly be included in their estimate of the value of the Omaha water works, which said questions your orators aver the board is without authority to determine or adjudicate.

And your orators further allege that the defendant, the Omaha Water Company, made and is making certain claims before said board of appraisers in regard to the property and rights which are to be appraised under the terms of the ordinances before set forth, and as to the method and time of said appraisement, and as to the construction of the said contract under which said appraisement is being made, and as to the powers and duties of said board of appraisers, which said contentions are purely and solely questions of law, and which said claims and pretensions are resisted by your orators, and which will be, and are, hereinafter more particularly set forth.

XV.

Your orators further show to the court that the said board of appraisers appointed under and by virtue of the terms of Ordinance No. 423, were appointed for the purpose of appraising the water

works plant which was erected under and by virtue of Ordinance No. 423, and which is necessary for the purpose of supplying the City of Omaha and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes, and that
434 said board of appraisers is without power or authority under said contract and appointment, to consider the values of any other property which may belong to the Omaha Water Company than that constructed and operated under and by virtue of the terms of Ordinance No. 423 and the ordinances amendatory thereof, and which is necessary and appurtenant to the supplying of the City of Omaha and its citizens and inhabitants with water. And said City of Omaha is without power in law to purchase or operate water works outside of said city or to purchase or own or operate water works for the purpose of supplying any other city or its inhabitants except the City of Omaha and its inhabitants.

And your orators further show to the court that the defendant, the Omaha Water Company, is contending and claiming before said board of appraisers that it is the duty of said board of appraisers to make an estimate and award of all of the property of the Omaha water plant, both that which is within the City of Omaha and necessary and appurtenant to supplying the said City of Omaha and its citizens and inhabitants with water, and that which is outside of the City of Omaha and which was not constructed under and by virtue of Ordinance No. 423 or the amendatory ordinances thereof, and is not necessary or useful for supplying the city of Omaha and its citizens and inhabitants with water, to-wit: the pipe systems and connections in the municipalities of South Omaha, East Omaha, Benson and Dundee, and the portions of the pipe systems and connections in Florence which are not used for the purpose of supplying the mains leading to the City of Omaha; and said Omaha Water Company is contending before the said board of appraisers that the estimate and award of the value of said property shall all be made in one award without segregation.

And your orators further show to the court that the value of the pipe systems and connections outside of the City of Omaha and outside of that portion of the works in Florence which are necessary and appurtenant to supplying the City of Omaha and its citizens and inhabitants with water are of great value, and are claimed by the Omaha Water Company to be of a value in excess of \$1,000,000.00.

Your orators further show to the court that the board of appraisers have spent much time discussing and contending over the question of whether or not they shall include said property which is outside of the City of Omaha and not necessary to supplying said city with water, and that the salaries of said appraisers amounts to in excess of \$100.00 a day, and that unless restrained by the order of this
435 court, and unless this court shall enter a decree construing said contract and the powers and duties of said board, the said board of appraisers will make and return one entire award for all of the property of the Omaha Water Company, including that which lies outside of the City of Omaha and not appurtenant or

necessary to supplying the said City of Omaha and its citizens and inhabitants with water, without segregation therein of the separate amounts estimated and awarded by said board for the value of those pipe systems and connections which are located in the several municipalities of South Omaha, East Omaha, Benson, Dundee and Florence.

And your orators further show to the court that if such an award is made in aggregate without segregation of the separate items which constitute the award, and said appraisers shall estimate and award in one gross sum the value of all of the property of the Omaha Water plant, including that outside of the City of Omaha and not appurtenant or necessary to supplying the said City of Omaha with water, the said estimate and award would be null and void, and beyond the power and authority conferred upon said appraisers under the terms of their appointment, and the ordinances and contract in relation thereto.

And your orators further show to the court that the costs and expenses of the appraisement will amount to a sum in excess of \$10,000.00, and that if said award shall be returned in gross as aforesaid, that it will be null and void and all of the expenses of said appraisement will be lost to the City of Omaha, and that it will be irreparably damaged in the loss of said expenses, and in the delay in acquiring the water works from the Omaha Water Company under its contract, for which loss and damage it has no remedy at law.

XVI.

Your orators further show to the court that the Omaha Water Company, defendant herein, contended before said board of appraisers and is contending, that the said board shall estimate the value of the property to be appraised as of the date of the passage of Ordinance No. 5162 heretofore set forth, electing and determining to purchase said works, and that the said City of Omaha and the Water Board of the City of Omaha is contending that the value of said plant should be fixed and determined as of the date of award, and that the difference in the value of the plant or amount of the award will largely depend upon the date fixed for the estimate of its value; that if it is fixed as of the date of the passage of the aforesaid ordinance the estimate of value will be \$200,000.00

436 or more greater than the estimate of value if found and returned as of the date of the award or of the submission to the appraisers, to-wit: January 3, 1905. And your orators further aver that the said board of appraisers convened and organized as a board on July 20, 1903, and that the defendant, the Omaha Water Company, demanded and claimed the right to present detailed schedules of its property and refused to allow said board of appraisers to appoint a suitable expert to prepare said schedules and lists of property and by one excuse and another was not ready to present and close its showing until in December 1904, and by a series of pretences and excuses delayed the submission of said appraisement until January 3, 1905, and is still delaying the return of the award by said appraisers by reason of its contentions and

insistence before said board that separate estimates of values of the different items of property shall not be returned, and by its insistence that said board shall return an estimate of value as of the date of the appointment of said board and not otherwise; and your orators aver that since said date of appointment the value of said water works has greatly depreciated and is still depreciating to the extent of more than \$100,000.00 per annum.

And your orators further show to the court that the members of the board of appraisers are unable to agree as to the time as of which the estimates of value shall be fixed, and are *are* about to, and will, unless restrained by the order of this court, fix upon the average value during a period of years in disregard of the rights of the complainants herein, and will fix, render and award an estimate of value upon an arbitrary term of years, not including the entire life of the plant, and that if said board shall thus fix and determine upon an arbitrary term of years, or upon a term of years of less than the entire average of the life of said plant, it will result in an appraisement largely in excess of the estimate of value if fixed as of the date of the award, or of the submission Jan. 3, 1905.

And your orators aver that said board is without power or authority to fix and determine upon the value of the plant through an average period of years, and that if said award shall be made either as of the date of the appointment of the board of appraisers, or as of a term of years, the said award will be nugatory and void, to the great and irreparable damage of the complainants herein, and for which they have no remedy except through the processes of a court of equity.

XVII.

Your orators further show to the court that the Omaha Water Company has presented to the board of appraisers, and tends that the said board of appraisers shall estimate and return as a part of their award, without segregation therein, the value of certain real estate to which it has no right and title, namely; the value of certain streets and public grounds of the City of Omaha which it uses and occupies by reason of the grant made to it under ordinance No. 423; that the said Omaha Water Company owns a pumping plant known as the River Station, located in Block 2 of the City of Omaha, that it owns at said place Lots 1, 2, 3, 4, 5, 6, 7 and 8 in Block 2, and Lots 2 and 6 and the north ten feet of Lots 3 and 7 in Block 328, and that it owns no other real estate at said River Station near the intersection of Burt Street and the Missouri River, but that it presented to the board of appraisers and is contending and claiming that the appraisers shall estimate and award to them as a part of one general award, the value of Government Lots 2, 3 and 4, and of the portions of the street surrounding the lots and blocks owned by the Omaha Water Company, and that the said Omaha Water Company has no title or claim to the said Government Lots 2, 3 and 4, and the streets and alleys surrounding the lots before described as belonging to the said Omaha Water Company, and that said property so wrongfully included in the property which the Omaha Water Company claims

shall be appraised in gross is claimed to be of a value in excess of \$5,000.00; and your orators allege that the said Omaha Water Company has no claim or title to said property, and that it is and has been occupying the same through the permission of the City of Omaha, and under and in accordance with the authority and license granted to said company under Ordinance No. 423 before referred to, but that said appraisers have no method of determining the title of said property, and are not authorized and empowered to pass upon the title of said property and are not learned in the law, and that no facts upon which a determination of the right of the Omaha Water Company to said property have been presented to said board of appraisers by said Omaha Water Company, and that if the said award of the appraisers shall be made in gross without returning a separate estimate for the value of said property so wrongfully claimed by the Omaha Water Company, that the entire appraisal will become nugatory and void, and that the large and numerous expenses incurred therein in behalf of the City of Omaha will be lost to the city, and the city will be delayed in its right to acquire the works of the Omaha Water Company.

And your orators aver that unless restrained by the order of this court, the said appraisers will include in one gross sum in their
438 estimate of the value of the water works belonging to the Omaha Water Company, the value of said Government Lots 2, 3 and 4, and the streets, and alleys surrounding the Burt Street Station of the Omaha Water Company, to the great and irreparable injury of these complainants, and that these complainants have no remedy at law in said matter.

XVIII.

Your orators further show to the court that the said Omaha Water Company is claiming of the said board of appraisers that the said appraisers include in their award in one gross sum, the value of the streets and alleys in the City of Florence and the value of certain land lying near and adjoining their works on and over which the Chicago, St. Paul, Minneapolis & Omaha Railway Company have tracks and right of way, which was acquired long prior to the location of said Omaha water works; that the said streets and alleys in the City of Florence were vacated by the City of Florence under and by virtue of a contract between the predecessors of the Omaha Water Company and the City of Florence, by the said Omaha Water Company was given the right and permission to use and occupy said streets and alleys; that adjoining said reservoirs of the Omaha Water Company on the east is a certain tract of land 100 feet wide over which the said Chicago, St. Paul, Minneapolis & Omaha Railway Company have a right of way, and which said strip of land running the entire length of the reservoirs of the Omaha Water Company and 100 feet wide, the Omaha Water Company never acquired any title or right to, except by permission of the said railway company, and that the said streets and alleys as before described and the said right of way of the Chicago, St. Paul, Minneapolis & Omaha Railway Company were included in and presented to the

board of appraisers as a part of the property of which said appraisers were to estimate the value, but that no evidence or facts were submitted to the said board of appraisers by the Omaha Water Company upon which title of said property could be determined, and that said board of appraisers is without power or authority to pass upon or determine the title of said Omaha Water Company to said streets and alleys in the City of Florence, or the title to said strip of land occupied by the said railway company under its right of way for railroad purposes, and that it is claimed that the value of said property so wrongfully included by the Omaha Water Company in the list of property to be appraised by said board of appraisers is of a value in excess of \$5,000.00, and that unless restrained by the order of this court the said board of appraisers will consider and include in one gross estimate of value, the value of the streets and alleys in the City of Florence adjoining and surrounding
439 the lots and blocks owned by the Omaha Water Company, and will include in said estimate of value the value of the 100 foot strip right of way on the east of the reservoirs owned by the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, without separation therein, and that if the award is so made it will render the entire appraisalment of the board of appraisers nugatory and void, and the complaints will suffer great damage in the loss of the great and enormous expenses incurred by them in making said appraisalment, and in the delay which will result in the securing of the water works from the Omaha Water Company, and that by reason thereof these complainants will suffer great and irreparable injury for which they have no remedy at law.

XIX.

Your orators further show to the court that the said Omaha Water Company is contending before said board of appraisers that the said board shall include in one grand total estimate of value without segregation therein, the value of certain lands which it is claimed are owned by the Omaha Water Company, to-wit: the west 25 acres of the south half of northeast quarter ($NE\frac{1}{4}$) of section 7, township 15, range 13, containing twenty five acres, more or less, situated near Krug's Park in the County of Douglas which it is claimed by the Omaha Water Company to be of a value in excess of \$40,000.00, but your orators show to the court that said land is no part of the water works plant and has never been used by the water works company in connection with the operation of the plant, and is not necessary or serviceable or useful in the operation of said plant, and that unless restrained by the order of this court the said board of appraisers will include in their report and estimate of value, without segregation therein, the value of said tract of land, and that by reason thereof the whole appraisalment will be rendered nugatory and void, and the complainants will suffer great damage by reason of the large and enormous expenses of said appraisalment, and by reason of their being delayed in the acquisition of the water works from the Omaha Water Company, and will suffer great and irreparable injury for which they have no adequate remedy at law.

XX.

Your orators further show to the court that the said Omaha Water Company presented to said board of appraisers as a part of the property to be appraised by them, and is contending before said board that it should appraise the N. 50 ft. lot 17 & S. 42 ft. & W. 10 ft. of N. 50 ft. of Lot 18 Block 2 in Armstrong's Addition in the City of Omaha, and that the said board of appraisers shall include the value of said property in one gross appraisement of the property of the Omaha Water Company without segregation therein, so as to show the amount and estimate of value placed upon said property.

Your orators further show to the court that the said lots and parcels of land are no part of the water works constructed under and by virtue of Ordinance No. 423; that said property is claimed by the Omaha Water Company to be of a value in excess of \$2,000.00; that the said property is used simply for rental purposes, and is not in any way necessary, serviceable or useful in the operation or construction of the water works plant, and that unless restrained by an order of this court the said board of appraisers will include in one gross estimate of value without segregation, or separation of the sum added to the appraisement on account of said property, the value of said lots and parcels of land, and that the said award of said appraisers will be nugatory and void, and that these complainants will suffer great loss and injury by reason of the large and enormous expenses incurred and to be incurred by them in making said appraisement, and in the delay which will be occasioned in the acquisition of the said Omaha water works, and that these complainants will thereby suffer great and irreparable injury, for which they have no adequate remedy at law.

XXI.

Your orators further show to the court that the said Omaha Water Company presented to the said board of appraisers and is contending before said board that it shall make, return and include in the estimate of value, the value of certain lots and parcels of land, to-wit: Block 9, Lot 5 in Block 1, Block 4 in Block 39, Lots 5, 6, 7 and 8 in Block 38, Lots 6 and 7 in Block 29, Lot 2 in Block 18, Lot 6 in Block 19, Lot 8 in Block 49, and the south half of Lot 4 in Block 51 in the City of Florence, to which said lots the Omaha Water Company has no title; that the said Omaha Water Company is insisting that the value of these lots shall be included in one total estimate of the value of the works belonging to said Omaha Water Company without segregation therein, or estimate of separate value thereon by the appraisers, and that said lots are partly located in the reservoirs of said company, and that the board of appraisers are without power or authority to determine or pass upon the title of said property, but that unless restrained by the order of this court said board of appraisers will return the value of said lots in their estimate of the value of said water plant without segregation therein and without separate estimate of the value thereof, and that by reason thereof their said award and estimate of value will be

nugatory and void and these complainants will be greatly damaged in the loss of the large and enormous expenses incurred in making the appraisalment and in the delay in the acquisition of the water works of the Omaha Water Company, to the great and irreparable injury of the complainants, for which they have no remedy at law.

XXII.

Your orators further show to the court that in the construction of the water works belonging to the said Omaha Water Company, the said Omaha Water Company without authority from the City of Omaha, and without right, has entered upon the streets and public grounds of the City of Omaha and laid large mains thereon and thereunder for the purposes of supplying water to the municipalities of East Omaha, South Omaha, Benson and Dundee, and that by reason of its supplying water to said municipalities of East Omaha, South Omaha, Benson and Dundee, has increased to the size of its mains running through the City of Omaha, and claims before the said board of appraisers that the said board of appraisers shall include in their estimate of value without deduction, the entire cost of the said increased size of mains made necessary by its supplying water through the same to the municipalities adjacent to the City of Omaha.

Your orators also allege that the said increased size of the mains do not add to the value of the water works necessary for supplying the City of Omaha and its citizens and inhabitants with water, and that said increased cost will add to the estimate of value to be fixed by the appraisers in a large sum, to-wit: more than \$200,000.00, and that said board of appraisers unless restrained by the order of this court will include in their appraisalment without segregation, but as a part of the total appraisalment, the value of said mains which have been laid in the streets of the City of Omaha for the purpose of supplying the municipalities of South Omaha, Benson, East Omaha and Dundee, and the increased size of the mains which are made necessary for the aforesaid purpose without right or authority at law, and that thereby their appraisalment will become nugatory and void, and the complainants will suffer great damage in the loss of the large and enormous expenses of the appraisalment incurred by the complainants, and in the delay in the acquisition of the water plant of the Omaha Water Company, to the great and irreparable injury of the complainants, for which they have no adequate remedy at law.

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XXIII.

Your orators further show to the court that the Omaha Water Company is contending before the board of appraisers that it shall include in its estimate of value of the Omaha water works the value of a certain pumping station known as the Poppleton Avenue Pumping Station; that the said Poppleton Avenue Station was erected for the purpose of assisting in supplying water to the City of South Omaha; that it is not necessary or useful to the supplying of the City of Omaha with water and was not erected under and by virtue

was appointed and is acting, and shall find and determine the powers and duties of said board of appraisers under said appointment, and that unless this court shall by the powers in it lodged, restrain and command said appraisers, and construe and find the powers and duties of said appraisers under the terms of the ordinances providing for the appraisal and purchase of said Omaha water works and the appointment of said appraisers, the appraisal when made will be uncertain, and it will therefore take numerous lawsuits to determine the validity and sufficiency of the said appraisal, and if it should be found that in any of the particulars before set forth, or in any other particulars, that the said board of appraisers had included in their appraisal items of property or elements of value which said board were not authorized or empowered to include, or had omitted therefrom any items of property or elements of value which it ought to have included therein, then said entire award would be rendered nugatory and void, and the
445 several parties hereto would be without remedy to recover the expenses incurred in said appraisal, and the complainants would be delayed in the acquisition of said water plant.

And your orators further show that pending the appraisal the said Omaha Water Company is refusing to comply with the terms of Ordinance No. 423 and the contract for the supplying of hydrants mentioned heretofore, in that it is refusing to place and establish hydrants as are ordered by the City of Omaha under said contract, and that it is claiming and contending that it cannot and is not required to furnish hydrants as ordered pending said appraisal, and that there is in the City of Omaha an imperative necessity that the mains of the Water Company be extended and hydrants erected thereon; that whole streets have been opened and houses constructed thereon in the reliance upon the right to secure water under the terms of Ordinance No. 423, and the contract with Sidney E. Locke before referred to, which are now, without fault on the part of the city, without means of securing water for domestic use or for fire protection, and that by reason thereof said property is being greatly depreciated in value and the growth of the city is being retarded, and the health of the community is being endangered; and that if by reason of the failure of the appraisers to include the items of property or elements of value which ought to be included, or by reason of including the items of property or elements of value which ought not to be included the said appraisal and award is rendered uncertain, litigation will be required to determine the validity or invalidity of said award, and that during said litigation the said City of Omaha and its citizens and inhabitants would not be able to secure water for domestic and fire purposes upon the houses constructed on streets where mains are not now laid, and the conditions resulting from the refusal of the said Omaha Water Company to extend its mains and furnish hydrants will be greatly aggravated, the business interests of the city paralyzed and the health of the community seriously endangered, and these complainants and the inhabitants of Omaha will suffer great and irreparable injury, both to the value of their property and in the germination and spread of disease in said city.

And your orators further show to the court that in consideration of the premises the complainants and the inhabitants of the City of Omaha have no adequate remedy at law, and can have no adequate relief except through the intervention of a court of equity where matters of this kind are properly cognizable and reviewable; and that in order to secure the speedy return of an appraisement or estimate of value which shall be valid and binding, and under which the
446 purchase of said water works may be completed and which shall be free from imperfections and uncertainties, and in order that there may not be delay in the acquisition of said water works upon the return of an award by said appraisers, it is necessary that the rights, powers and duties of the said board of appraisers under the terms of said Ordinance No. 423, and the appointment thereof, shall be determined and adjudicated, and the rights of the complainants and the Omaha Water Company under said ordinances, and the conditions of said appraisement be settled in advance of the estimate of value to be fixed by said board of appraisers, and that this court enjoin and command the said defendants in accordance with their said rights.

And for as much as your orators are remediless in the premises at and by the strict rules of the common law, and can only have relief in a court of equity, to the end that the said defendants answer this, your orators' bill, but not under oath, their answers under oath and the answer of each of them under oath being hereby specially waived;

And your orators pray that it be found and decreed by your Honors that the City of Omaha has no right, power or authority in law to purchase, acquire, own or operate any part of the water works system belonging to the Omaha Water Company lying outside of the City of Omaha and now used and employed in supplying the municipalities of South Omaha, East Omaha, Benson and Dundee; and that it be found and decreed by your Honors that under and by virtue of the terms of the proposed purchase of the water works by the City of Omaha under Ordinance No. 423 and amendatory ordinances thereof of the City of Omaha, that said City of Omaha is required to purchase only that part of the water works belonging to the Omaha Water Company which is within the City of Omaha, and that part of the said water works as lies within the Village of Florence as is necessary and appurtenant to the use and operation of the said water works in the City of Omaha, for the supplying of said city and its citizens and inhabitants with water.

And your orators further pray that it be found and decreed by your Honors that it is the duty of the said defendants, Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as appraisers, to estimate the value of the water works to be purchased in accordance with Ordinance No. 423, and the subsequent ordinances of the City of Omaha in relation thereto, to make, fix and return their estimate of value as of the date when said award shall be rendered, or as of the date of the submission to said board of said appraisement, to-wit: January 3, 1905, and not otherwise; and
447 that it is the duty of said board of appraisers to exclude from their return consideration of the value of any pipe systems or

connections which are attached to the water plant of the Omaha Water Company, and which are situated in the municipalities of South Omaha, East Omaha, Benson and Dundee, and to exclude from their consideration such pipe systems and connections in the Village of Florence as are not necessary for, and appurtenant to, the pumping and supply station necessary for supplying the City of Omaha and its citizens and inhabitants with water; and that it is the duty of said appraisers to exclude from their consideration, and to make a return and award of value without considering the value of Government Lots 2, 3 and 4 in the City of Omaha, and the streets and alleys surrounding and within the lots and blocks belonging to the Omaha Water Company at its Burt Street Station in the City of Omaha; and that it is the duty of said board of appraisers to exclude from their consideration, and to return an award without consideration of the value of the streets and alleys in the Village of Florence adjoining and through the lots and blocks in said city owned by the Omaha Water Company, and without considering or including in their award, the value of the land taken by the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railway Company lying east of and adjoining the Omaha Water Company's reservoirs at Florence; and that it is the duty of said board of appraisers to exclude from their consideration, and to return an award without consideration of the value of the W 25 acres of the S 2 of North east quarter of section 7 township 15, range 13, being twenty-five acres near Krug's Park in Douglas County, Nebraska; and that it is the duty of said board of appraisers to exclude from their consideration, and to return an estimate and award without consideration of the value of any part of Lots 17 & 18 in Block 2, Armstrong's Addition to Omaha property in the City of Omaha; and that it is the duty of said board of appraisers to return a separate estimate of the value of Block 9, Lot 5 in Block 1, Lot 4 in Block 39, Lots 5, 6, 7 and 8 in Block 38, Lots 6 and 7 in Block 29, Lot 2, in Block 18, Lot 6 in Block 19, Lot 8 in Block 49, and the south half of Lot 4 in Block 51 in the Village of Florence; and that it is the duty of said board of appraisers to exclude from their consideration the increased value of the works within the City of Omaha, and to return an award or estimate of value without consideration of the increased value of the works within the City of Omaha arising from and due to, the increased size of the mains in the City of Omaha made necessary by the supplying of adjacent municipalities through mains lying in the City of Omaha; and that it is the duty of said board of appraisers to

448 exclude from their consideration, and to return an award without consideration of the value of the Poppleton Avenue Pumping Station; and that it is the duty of said board of appraisers to exclude from their consideration, and to return an award and estimate of value without consideration of the cost of the building of land into the Missouri River near the reservoirs near Florence, but that they shall return in their estimate of value on account of the said extension of the land into the Missouri River by the building of riprap, only such an amount as said appraisers shall find would be necessary for the reasonable protection of the lands and properties

of the Omaha Water Company against the encroachments of the river thereon; and that it is the duty of said board of appraisers to exclude from their consideration, and to return an award and estimate of value without consideration of what is termed going value, but upon the estimate of the values of the physical properties of said Omaha water works plant lying within the City of Omaha and necessary and appurtenant to the use and operation of said water works for the supplying of the City of Omaha and the citizens and inhabitants thereof with water.

Your orators further pray that your Honors may find, determine and decree the rights of the complainants and the Omaha Water Company, defendants in the premises, under and by virtue of the contracts of purchase and the appraisalment thereunder.

Your orators further pray the court that it may be ordered and decreed that the defendant, the Omaha Water Company, its officers, servants, agents and employés, be enjoined and restrained from claiming or asserting before the said board of appraisers that the said board of appraisers shall consider or allow in their estimate of value, anything for the portion of its property which consists of pipe systems and connections lying outside of the City of Omaha, and not useful or appurtenant to the supplying of said City of Omaha and its citizens and inhabitants with water, and from insisting and claiming before said board of appraisers that the said board shall make and return an estimate of value as of the date of the appointment of said board, or as of any other time except the time of the award or the submission of the appraisalment to said appraisers on January 3, 1905, and from insisting and claiming before said board of appraisers that it shall include and allow in its estimate of value any sum whatever for Government Lots 2, 3 and 4 in the City of Omaha, and the

449 Streets and alleys around and adjoining the lots and blocks near its Burt Street Station in the City of Omaha, and the streets and alleys adjoining, through and around the lots owned by said water company in the City of Florence, and the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railway Company lying east of the Omaha Water Company's reservoirs at Florence, and the west 25 acres of the S. 2 of northeast quarter of section 7 in township 15, range 13 near Krug's Park, and Lots 17 & 18 in Block 2, Armstrong's Addition in the City of Omaha; and from insisting and claiming before said board of appraisers that it shall include in said estimate of value without separate estimate, and statement thereof, the value of Block 9, Lot 5 in Block 1, Lot 4 in Block 39, Lots 5, 6, 7 and 8 in Blocks 38, Lots 6 and 7 in Block 29, Lot 2 in Block 18, Lot 6 in Block 19, Lot 8 in Block 49, and the south half of Lot 4 in Block 51 in the village of Florence; and from claiming and insisting before said board of appraisers that it shall include in its estimate of value the full value of the pipe system in the City of Omaha without deductions for the increased size of said pipes and mains made necessary by supplying adjacent municipalities; and from insisting and claiming before said board of appraisers that it include in its award and estimate of value, the value of the Poppleton Avenue Pumping Station; and from insisting and claiming

before said board of appraisers that it allow and include in its said estimate of value of said water works, any item or sum whatever for or by reason of what is termed going value; and from insisting and claiming before said board of appraisers that they shall take into consideration the cost of the construction of the works extending the land into the Missouri River near its reservoirs in the City of Florence; and from doing or advising any acts which shall be contrary to the findings and decree of this court as to the rights of the several parties under Ordinance No. 423 and the subsequent ordinances of the City of Omaha in relation to the appraisement and purchase of the water works.

And your orators further pray that Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as a board of appraisers of the water works to be purchased by the City of Omaha from the Omaha Water Company, be enjoined and restrained from considering or returning in its estimate of value, any items of property other than those items of property belonging to the Omaha Water Company which are situated in the City of Omaha and which are necessary, useful and appurtenant to the use and operation of said water works in said city, and such portions of said water works plant as

are situated in the village of Florence and as are necessary
450 and appurtenant to the supplying of the City of Omaha and its citizens and inhabitants with water; and that they and each of them be enjoined and restrained from considering, or spending time in consideration of, and from returning or including in their estimate of value of said water works, any items of value for or on account of the pipe systems and connections lying and situated in the municipalities of South Omaha, East Omaha, Benson and Dundee, or situated in Florence and not useful and appurtenant to the supplying of the City of Omaha with water; and from considering the value of said plant as of any other date than the date of the award or the submission of the matter to said appraisers on January 3, 1905; and from fixing and estimating the value upon an arbitrary term of years less than the entire previous life of said water works; and from considering or including in their estimate of value any sum whatever for or on account of Government Lots 2, 3 and 4, in the City of Omaha, and the streets and alleys around, through and adjacent to the Burt Street Pumping Station, and for the streets and alleys around, through and adjacent to the lots owned by the Omaha Water Company of Florence, and for the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railway Company east of the reservoirs at Florence, or for the west 25 acres of the S. 2 of northeast quarter of section 7 in township 15, range 13, in Douglas County, Nebraska, near Krug's Park, or for Lots 17 and 18 in Block 2 Armstrong's Addition in the City of Omaha, or for Block 9, Lot 5 in Block 1, Lot 4 in Block 39, Lots 5, 6, 7 and 8 in Block 38, Lots 6 and 7 in Block 29, Lot 2 in Block 18, Lot 6 in Block 19, Lot 8 in Block 49, and the south half of Lot 4 in Block 51 in the village of Florence; and that they be enjoined and restrained from including in their estimate of value and returning therewith, any value for the increased size of mains lying in the City of Omaha which are

made necessary by reason of the supplying of adjacent municipalities, and from including in said estimate of value and return thereof, anything on account of the Poppleton Avenue Station, and from considering or including in their estimate of value and return thereof any sum whatever for or on account of what is termed going value; and that they be further enjoined and restrained from spending time or considering the cost of the reproduction of the works building out land into the Missouri River near the Florence reservoirs other than in the determination of what would be necessary expense in providing an adequate and reasonable river protection for the lands and works of the company situated at Florence. And your orators further pray that the said Daniel W. Mead, John W. Alvord and

451 George H. Benzenberg may be commanded and directed to make and return an estimate of the value of the water works only which are situated within the City of Omaha and are useful, necessary and appurtenant to the supplying of said City and its citizens and inhabitants with water, and so much of said works in the City of Florence as are necessary, useful and appurtenant to the supplying of said City of Omaha and its citizens and inhabitants with water; and that it make and return an estimate of value without consideration for the value of the several pieces of real estate heretofore set forth and which it is asked that they be enjoined from considering in arriving at their estimate of value, and without allowing anything for what is termed going value, and without allowing for the increased value of the mains in the City of Omaha made necessary by the use of said mains for the supplying of adjacent municipalities with water, and without including the value of the Poppleton Avenue Pumping Station, and without including the cost of the works extending the land into the Missouri River east of and adjacent to the reservoirs of the Omaha Water Company at Florence, Nebraska.

Your orators further pray that they be granted such other and further relief as the circumstances of this case may require and is agreeable to equity and good conscience, and its costs in this suit.

May it please your Honors to grant unto your orators not only the writ of injunction issuing out of and under the seal of this Honorable Court, directed to the said defendants, the Omaha Water Company, Daniel W. Mead, John W. Alvord and George H. Benzenburg, commanding and enjoining them as hereinbefore prayed, but also a writ of subpoena issuing in like manner, directed to the said defendants, commanding them and each of them at a day certain therein to be inserted, to appear before your Honors and this Honorable Court, and stand to, perform and abide by such order and decree as to your Honors shall seem meet and equitable, and your orators will ever pray.

THE CITY OF OMAHA,

By JOHN P. BREEN, *Its Solicitor.*

THE WATER BOARD OF THE CITY
OF OMAHA,

By C. C. WRIGHT, *Its Solicitor.*

JNO. L. WEBSTER, *Of Counsel.*

District of Nebraska.

STATE OF NEBRASKA,
County of Douglas, ss:

James E. Boyd, being first duly sworn, says he is the President of the Water Board of the City of Omaha, one of the Complainants in the foregoing bill; that he knows the contents of the same and has heard the same read, and that the statements and allegations therein contained are true.

JAMES E. BOYD.

Subscribed in my presence and sworn to before me this 7th day of July, 1905.

[SEAL.]

CHARLES W. PEARSALL,
Notary Public in and for Douglas County, Nebraska.

Endorsed: Filed Jul- 7, 1905. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: — There was offered in evidence in the case of Omaha Water Company vs. City of Omaha, No. 74 Docket "X", the Restraining Order entered in the Case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., No. 209 "W", on the 7th day of July, 1905, which said Order is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

THE WATER BOARD OF THE CITY OF OMAHA and THE CITY OF
OMAHA, Complainants,

vs.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG, and
THE OMAHA WATER COMPANY, a Corporation, Defendants.

Restraining Order.

On presentation of the petition in the above entitled action, and upon consideration thereof, it is

Ordered that the application of the complainants for a temporary injunction is hereby set down for hearing on the 20th day of July, 1905, at 9:30 o'clock A. M., at the Judge's Chambers in the City of Omaha, Nebraska, and the Complainants are directed and required to notify the said defendants of the time and place of said hearing ten days before the hearing thereof.

It appearing that there is danger of irreparable injury from delay, it is

Ordered that the defendants, Daniel W. Mead, John W. Alvord, and George H. Benzenberg, and each of them, be restrained until the final hearing and disposition of said motion for a temporary order of injunction from returning an appraisement of the value of the property of the Omaha Water Company in a gross sum which

453 shall include the value of the pipe systems and connections lying and situated in the municipalities of South Omaha, Benson, East Omaha and Dundee; and from considering or returning in their estimate or award any amount for or on account of Government lots two, three and four, in the City of Omaha, and for the streets and alleys adjoining and through the lots and blocks owned and used by said Omaha Water Company as the Burt Street Pumping Station, and for streets and alleys adjoining and through the lots and blocks and owned and used by said Water Company in Florence, Nebraska; and for the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railway lying east of and adjacent to the reservoirs of the Omaha Water Company at Florence; and for the west twenty-five acres of the south half of the northeast quarter of section 7, township 15, range 13, east of the 6th principal meridian; and for any part or portion of lots seventeen and eighteen in Block two, of Armstrong's Addition to Omaha; and also the Poppleton Avenue Pumping Station; and also including an estimate of value for or on account of said water plant as a going concern, or including in their estimate or award the cost of the construction of the extension of land into the Missouri River east of and adjacent to the reservoirs of the Omaha Water Company; and from including any property owned by the Omaha Water Company lying and being outside of the City of Omaha, except such part of the works of said Company at Florence, Nebraska, and the connections therewith to the portion of the plant in the City of Omaha and from fixing the value of said water works as of a date prior to the final submission of said appraisement to said defendants as appraisers, to-wit, January 3, 1905.

Any report or appraisement made before the final hearing and disposition of said motion, which includes the estimate of value — any of said properties herein mentioned shall contain the values of each of said properties separate and distinct by themselves, and until the hearing and disposition of said motion said defendants are restrained from further considering the values of said properties herein described in said restraining order at the expense of any of the parties to this action.

Dated at Omaha, Nebraska, July 7, 1905.

W. H. MUNGER, *Judge*.

Endorsed: Filed Jul. 7, 1905. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: — There was offered in evidence in the case of the Omaha Water Company vs. The City of Omaha, No. 74 Docket "X", the answer filed in the case of the Water
454 Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., No. 209 Docket "W", which said Answer is in words and figures following, to-wit:

In the Circuit Court of the United States within and for the District of Nebraska.

THE CITY OF OMAHA et al.

VS.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG and
THE OMAHA WATER COMPANY.

The Answer of the Omaha Water Company, Defendant, to the Bill of Complaint of the Water Board of the City of Omaha and the City of Omaha, Complainants.

This defendant now and at all times hereafter saving and reserving to itself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's Bill of Complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is material for it to make answer unto, answering says:

I.

The defendant the Omaha Water Company is advised and believes and therefore avers that the Water Board of the City of Omaha has no power under the statutes of the State of Nebraska or otherwise to regulate or fix any water rates or fire hydrant rentals specified or provided for in Ordinance No. 423, adopted by the City of Omaha on June 11, 1880, or in the contract between said City and Sidney E. Locke dated July 20, 1880, or to reject any bills for water or fire hydrants furnished said city by this defendant under said ordinance or said contract, or to terminate on behalf of said city, any contract with this defendant for the supply of water to said city for any purpose, without the consent of this defendant; and denies that said Water Board has, under statutes or otherwise, any general or other supervision of any appraisement resulting from the election of the City of Omaha to purchase the water works of this defendant by virtue of any right inuring to said city through said ordinance, or the contract thereunder, and denies that said Water Board has any power whatever to reject any appraisement or award resulting from such appraisement; and this defendant is advised and believes and therefore avers that in so far as any statute of the state of Nebraska may purport to give said Water Board any such power, such statutes impairs the obligation of the contract between said City of Omaha and this defendant in regard to such appraisement as set forth in said ordinance and in regard to the water and rentals set forth in said Ordinance and contract, and is in violation of the
455 provision in that regard in Section 10 Article I of the Constitution of the United States.

Otherwise, this defendant admits the allegations contained in the paragraph of the Bill of Complaint numbered I.

II.

This defendant admits that this defendant is a corporation organized and existing under and by virtue of the laws of the state of Maine for the purpose of owning and operating water works in the City of Omaha and elsewhere in the County of Douglas in the State of Nebraska, and [has] leave to refer on the hearing herein, to a duly authenticated copy of the charter of this defendant for the contents thereof; and admits that this defendant is a citizen and resident of the State of Maine, and admits the allegations in the paragraph II with respect to the other defendants herein.

III.

This defendant admits the allegations contained in the paragraphs of the Bill of Complaint numbered III, IV, V, VI, VII and VIII.

IV.

This defendant denies that East Omaha is a municipality, or that this defendant owns any water works in Benson or that the water works owned by this defendant in the cities of South Omaha, and Florence and in the Village of Dundee, are not in any way necessary or appurtenant to the water works which are useful and necessary for supplying the city of Omaha and the citizens and inhabitants thereof with water, or that the water works in said cities and village were not erected by or with or under the authority of the city of Omaha, or by virtue of any contract with the city of Omaha or rights given to Sidney T. Locke and his successors under the ordinances authorizing the construction of water works for the City of Omaha and its citizens and inhabitants; or that said Ordinance No. 423 provided only for the construction and maintenance of water works in the city of Omaha, or that it was not contemplated at the time of the passage of said ordinance that said Sidney E. Locke or any other person or association should construct water works under said ordinance outside of the city of Omaha. On the contrary, this defendant alleges that said ordinance expressly provides for the construction of water works within and adjacent to the city of Omaha in Douglas County, State of Nebraska, and that the pipe system supplying South Omaha, Florence, East Omaha and Dundee with water, are also useful for supplying the city of Omaha
456 and the citizens and inhabitants thereof with water for fire protection and other purposes.

Further answering this defendant alleges that in the year 1887, the American Water Works Company of Illinois, then the owner of the Water Works constructed under said ordinance No. 423, commenced the construction upon the bank of the Missouri River in the City of Florence, which is adjacent to the city of Omaha in the County of Douglas, of intakes, a power house, sewer, settling basins, protection from the river, and pumps for drawing the water from the river to the highest of said basins and pumps for pumping the water from the lowest of said basins to the reservoir at Walnut Hill in the City of Omaha, and otherwise providing for the distribu-

tion of water throughout the company's water works system; and that, in connection with such undertaking and the securing from the City of Florence the necessary rights for such pumping station and the distribution of water from said settling basins, an ordinance was passed by the Mayor and Council of the City of Florence on August 8th, 1889, "to procure a supply of water for the city of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor"; and that a contract was made accordingly between the said city and said company for such purpose, under which and under an ordinance passed by the Mayor and Council of said City, on September 2, [1803], water not needed by the City of Omaha and its inhabitants was ever since supplied from said source of supply to the city of Florence, and its inhabitants, with the knowledge of the City of Omaha and its inhabitants, and without objection on the part of any parties whatever.

Further answering, this defendant alleges that in the year 1887, the American Water Works Company of Illinois, then the owner of the Water Works constructed under said ordinance No. 423, had and could deliver by its mains and pipes, more water than was needed or called for by the City of Omaha and its inhabitants, and that the City of South Omaha which is adjacent to the City of Omaha in said County of Douglas, and the inhabitants of said City of South Omaha and the industries located, built and operated at that city, had urgent need of such surplus and made demand therefor, and that thereupon said company entered into contracts with the City of South Omaha and the proprietors of the several industries there located for supplying them with water, the contract with the City of South Omaha being expressed in an ordinance approved October 17, 1887, and renewed by an ordinance approved Aug. 25, —; and that in

457 said year of 1887, the American Water Works Company of Illinois extended its mains, pipes and works into said City of South Omaha with the knowledge of the City of Omaha, its Mayor and City Council and its inhabitants and that such mains, pipes and water works have ever since been maintained therein, and that there has ever since been delivered and distributed through said mains, pipes and works to said City of South Omaha and its inhabitants and industries, water not needed or called for by the City of Omaha and its inhabitants, and without objection from any parties whatever.

Further answering, this defendant alleges that on September 7, 1889, the Village of Dundee which is a municipal corporation organized under the laws of the State of Nebraska, and located adjacent to the City of Omaha in said County of Douglas, passed by its proper authorities a resolution granting to said American Water Works Company of Illinois, the right and privilege of laying water mains and pipes and erecting hydrants in certain streets therein mentioned, within said village for the purpose of supplying said village and its inhabitants with water for fire protection and domestic and mechanical purposes, in accordance with demands made for such water, and that thereupon said water works company laid such mains and pipes and erected such hydrants; and that the same have

ever since been maintained and that through the same there ever since has been and now is delivered water for said purposes, water not needed by the City of Omaha or its inhabitants.

Further answering, this defendant alleges that on August 8, 1890, said American Water Works Company of Illinois entered into a contract with the East Omaha Land Company, a corporation organized under the laws of the State of Nebraska, wherein it was recited that the said Land Company was the owner of a large body of land therein described adjacent to the city of Omaha in said County of Douglas, a part of which land had been laid out in lots, streets and alleys by said Land Company, and the said Land Company granted and conveyed to the said Water Company, the right and privilege to lay down, maintain, repair, relay and replace water pipes, valves, hydrants and other apparatus for the distribution of water in, upon, along and through the said streets, lanes, alleys and public places according to a plat thereto attached, and that the said Water Company agreed that it would when thereunto required, lay certain lines of pipes and place certain hydrants and keep said mains and hydrants supplied with water for fire, domestic and manufacturing purposes; and that thereupon, the said Water Company did lay mains and pipes and erect hydrants accordingly, through which there has ever since been and now is supplied as required

458 and demanded for the purpose aforesaid, water not needed by the City of Omaha or its inhabitants, with the knowledge of said city and its inhabitants and without objection on the part of any parties whatever.

Further answering, this defendant alleges that the cities of Omaha, South Omaha, Florence and the Village of Dundee and the lands of East Omaha are not only communities adjacent to one another within said County of Douglas, but for all purposes of business and intercourse, form one community and are not distinct, save that they are separately organized, and that the water supply owned and furnished by said American Water Works Company and now owned and furnished by this defendant was and is the only water supply available for any of said communities for fire protection or domestic or mechanical purposes, and that the supplying of said communities outside of the city of Omaha with water not needed for said city or its inhabitants, is not only necessary to said communities but it is a profitable and valuable part of the business of this defendant, and that the mains for supplying all of said adjacent communities except Florence pass through the city of Omaha, and that the contents thereof are available for fire protection within the City of Omaha.

On or about the 1st of July, 1887, the said American Water Works Company executed and issued its bonds in the aggregate amount of \$4,000,000 with coupons for interest thereto attached, and at the same time executed its mortgage to the Farmers' Loan & Trust Company as trustee upon the said water plant and on the 16th day of January, 1889, executed to the said Trust Company, a supplemental mortgage upon all its property to secure the same bonds. In both of said mortgages, it was provided that if the said Water Works

Company made default in the payment of the principal sum evidenced by the said bonds or in any installment of interest thereon and the said default should continue for 90 days, it should be competent for the said Trust Company to declare the whole debt immediately due and it should be lawful for the said Trust Company to foreclose both of said mortgages.

On the first day of January, 1892, the said Water Works Company made default in payment of the interest upon the said bonds which fell due on that day, and also on the first day of July of the same year made a further default in payment of interest on the said bonds which fell due on that day, and also on the first of January, 1893, made a further default in the payment of the interest on said bonds which fell due on that day. The said defendant faults having continued for more than ninety days, on the 9th of October, 1893, the said Trust Company commenced its suit for for-closure of said mortgage against the said American Water Works Company and others, and thereupon Ellis L. Bierbower and Alonzo B. Hunt, were by said court appointed Receivers of the said Water Works Company and the property in said mortgages and bill described with authority to take possession and control of all and singular the goods, rights, franchises, choses in action and property, both real and personal, of every name and nature of the said American Water Works Company of Illinois and the American Water Works Company of New Jersey, situate in Douglas County, Nebraska; together with all the privileges, easements and franchises of said companies in Douglas County, Nebraska; also all the water works, mains, pipes, machinery, stand-pipes, assets, effects, chattels, real and personal of every name. The said order remains of record in this Court, and this defendant prays leave to refer thereto if it shall be necessary to do so.

The defendants in the said bill having fully answered thereto and proofs having been taken by the respective parties, and on the 24th of June, 1895, a decree was rendered by this court foreclosing said mortgages and ordering the said American Water Works Company to pay into the Registry of this Court \$4,159,054.18, within two months after the date of the said decree and that in default of so doing, that all and singular the mortgage-premises be sold at public auction by and under the direction of one of the Masters of this Court. This defendant prays leave to refer to the record of said decree and order of confirmation should it be necessary to do so. The said Company having failed to make the payment so as aforesaid ordered in said decree within two months of the date thereof, one of the Masters of this Court was charged with the execution thereof and sold the said premises to the said Trust Company, which sale was duly confirmed by this court, and the master was ordered to execute his deed to the purchaser. And on the — day of — he duly executed his deed to said Trust Company in due form of law. Afterwards the said Trust Company for a valuable consideration conveyed all the said mortgaged premises to this defendant, and thereupon possession of the said mortgaged premises and all thereof, was delivered to this defendant which entered into posses-

sion of the said premises and has ever since been in possession thereof.

This defendant prays leave to refer to said two deeds as well that from the said Master to said Trust Company as that from said

Trust Company to this defendant, both whereof are in the
460 hands of this defendant ready to be produced as your Honor shall direct.

This defendant further answering, alleges that the water works constructed and extended in all of said cities and places by said American Water Works Company of Illinois as aforesaid, were mortgaged by said company as one property, sold as one property on the foreclosure of the aforesaid mortgage, purchased as one property at the foreclosure sale by said Trust Company, and were conveyed to this defendant as one property by said Trustee, and have been mortgaged as one property by this defendant, and always operated as one property, and that the system of water works operated by this defendant, including all of said water works within and without the city of Omaha, is virtually inseparable and incapable of segregation for the purposes of operation, valuation or otherwise.

V.

On the 16th of May, 1896, the complainant, the City of Omaha, commenced its suit in this court against the said Farmers' Loan & Trust Company, the American Water Works Company of Illinois, Thaddeus S. Clarkson, receiver of said Company, and Ellis L. Bierbower and Alonzo B. Hunt as receivers of the same company, and afterwards by order of this court in said cause, the Omaha Water company was impleaded as a defendant, and answered the said bill therein. In the bill of complaint in said suit, the city of Omaha alleged among other things, that the said American Water Works Company had failed, neglected and refused to keep the said Water Works plant in good order and repair and ready and fit for immediate and constant use in accordance with the ordinance Number 423, hereinbefore entitled, and claimed under section 11 of said ordinance, that the said Water Works Company and this defendant the Omaha Water Company, had forfeited all the rights, privileges and immunities granted and acquired under said ordinance, and that the said city had thereby become vested with the ownership, possession, control and management of said water works plant and the property appurtenant thereto and connected therewith. In its said bill of complaint the said city alleged that all the property real and personal, described in said mortgages was necessary to said Water Works Company to enable it to maintain its system of Water Works, and to supply the city of Omaha with water for domestic and public purposes and for fire protection, and that all the property described in said decree, order of sale and advertisement thereof,

included all of the property constituting the water works
461 plant constructed and maintained for the purpose of supplying said City of Omaha with water for public and private and fire purposes, and that all said property therein described was appurtenant to and a necessary part of the said water works plant

necessary for its use and maintenance and operation in supplying the said city with water for public and domestic purposes save and except such limited portion of the water mains as might lie within the limits of the City of South Omaha, and that all the real estate, pumping stations, engines, settling basins and reservoirs were a necessary part of said water works plant for the city of Omaha, proper, and that no part of said plant lay within the City of South Omaha, except an extension of certain water mains from the south limit of the city of Omaha, all of the property, rights, privileges and franchises described in the aforesaid mortgages, or either of them was absolutely essential to the operation of the said water works, and to the performance of the public duty, lying and being on said American Water Works Company, and that without the same and every part thereof, the said American Water Works Company could not perform its said obligations nor fulfill its said contract. By divers other allegations in the said bill contained, the City of Omaha claimed that the whole of said water works system were forfeited to said city; and among other things, the said City prayed that it be adjudged, decreed and determined that the said city has a right to take the immediate possession of all the tangible property of the water works plant of every kind and nature, including all the property particularly described in the said decree of foreclosure. On the 13th of July, 1896, the said city filed in this court its amended bill of complaint, wherein it alleged the matters complained of by it in its said original bill, and among other things, that under and by virtue of the authority granted to it under the laws of the State of Nebraska, it had full authority and power to acquire title to all of the said water works plant and that the amount of consideration which it might be required to pay to the owner or owners thereof might be determined by appraisalment under the provisions of section 14, said Ordinance No. 423, and that all the rights, privileges and immunities granted and acquired by said American Water Works Company under the said Ordinance No. 423, and particularly under the provision of Section 11 thereof have become forfeited, and the said City of Omaha had thereby become vested with the ownership thereof and was entitled to take possession, control and management of the said Water Works plant and property appertaining thereto and connected therewith, and that all and singular the tangible and other property described in said mortgages, or

462 either of them is absolutely essential to the operation of the said Water Works and to the performance of the public duty of the said American Water Works Company and that without the same and every part thereof the said American Water Works Company could not perform its said obligations nor its said contract, and in its said Amended Bill the said city prayed, among other things, that it be adjudged, decreed and determined that it had the right to take the immediate possession of all the tangible property of the Water Works plant of every kind and nature, including all of the property in said bill and the said decree of foreclosure described, by divers other allegations as well in said original and said amended bill contained, and the whole scope, intent and purpose

thereof. The said City of Omaha claimed that the whole of said plant, including the rights, franchises, privileges and property, real and personal, in Douglas County, were forfeited to it and it was entitled to the immediate possession of all thereof.

VI.

In the year 18- the Poppleton Avenue Station mentioned in the Bill of Complaint in this cause was built by the American Water Works Company for the purpose of pumping water from that point to the high territory at or near Hanscom Park, whence it was distributed by pipes and mains through the parts of said city lying north of the south boundary thereof and thereby water was supplied thereto.

VII.

On the 27th of July, 1895, the said Ellis L. Bierbower and Alonzo B. Hunt, receivers aforesaid, gave this court to understand and be informed that they had come into an understanding and agreement with Swift & Company, the Cudahy Packing Company, the Omaha Packing Company and the G. Hammond Company, with reference to the furnishing of water to said companies for use in their business as packers at South Omaha; that such contracts have been formerly drawn up and signed by each of said companies and have been signed by the said receivers. On the 24th of August, 1895, an order was made by this court in said matter which recited that it appeared to the said court that said contracts were in all respects proper and to the advantage of the property of the said American Water Works Company then in the possession of the said Receivers, and that no cause had been shown why the said contract should not be approved, and ordered that the said contract be approved and the receivers authorized to make such expenditures as were necessary to lay additional pipe to South Omaha and carry out said contracts on their part, as by the said order remaining of record in this court. Reference being had thereto will more fully appear, but no notice of the application for said order or of said order was ever given to the said American Water Works Company, nor did it in any wise become a party thereto, nevertheless, under and by virtue of the said order in 1898, the said receivers laid mains from the Walnut Hill Station to the said Poppelton Avenue Station, and from that Station to South Omaha.

The said suit was subsequently tried upon the merits, whereupon, this [company] rendered its decree in favor of the defendants, including this defendant, denying the relief prayed for in the said original and amended bills.

After the 13th of July, 1896, the said American Water Works Company, relying upon the allegations and contentions of the said City of Omaha, hereinbefore stated, later extended its distribution system in South Omaha, Florence, Dundee and East Omaha, and constructed a large additional main from Florence to the City of South Omaha for the purpose of enlarging the supply of water of

the said cities of Omaha and South Omaha and their inhabitants, and constructed numerous other extensions and erected numerous hydrants in the city of South Omaha and elsewhere outside of the limits of the city of South Omaha, and expended large sums of money in such enlargements, extensions, constructions and erections, and expended large sums of money on the said works, and this defendant says that the said Water Works Company extended and enlarged its distribution system in South Omaha and constructed said additional main, and erected numerous hydrants in that city and elsewhere outside of the limits of the City of Omaha, and expended large sums of money on account thereof, relying upon the allegations hereinbefore recited, of the original and amended bill of said City of Omaha, and but for the said allegations, the said company would not have enlarged or extended its distribution system in South Omaha, or constructed the aforesaid large additional main or numerous extensions or erected numerous hydrants in South Omaha or elsewhere outside of the limits of the City of Omaha, or expended large sums of money in such enlargements, extensions, constructions and erections, nor afterwards entered into contracts with the packers of South Omaha to furnish them with water and by reason of the said allegations of the said City of Omaha in its said original and amended bills and its other acts and conduct in that connection; it can not be heard to contend or insist that so much of the said water works as is south of the southern boundary

464 of the City of Omaha is not an integral and necessary part of its whole plant. And this defendant further says that at the sale by the Master under the decree of foreclosure hereinbefore referred to, the Farmers' Loan & Trust Company being the highest and best bidder at said sale, paid to the said Master, on account of its bid, \$50,000 in money, and afterwards under the orders of this court, completed its purchase of said plant by paying the remainder of its bid. And the said Trust Company made said payments, relying upon the allegations hereinbefore recited in the original and supplemental bills of said city, and but for such allegations, it would not have bid for said property nor have performed the same. Wherefore this defendant insists that the said City of Omaha is estopped and can not now be heard to allege that by the said sale and the other proceedings thereon hereinbefore recited, it did not acquire all of said plant, including so much thereof as was South of the South boundary line of said city. And this defendant further says that when it took over the said plant by the conveyance to it made by the said Trust Company, as hereinbefore stated, it paid to said Trust Company the consideration of \$—, and did so, relying upon the said allegations of the original and amended bills of said city of Omaha, and its other acts in that behalf, and but for such allegations and the acts and conduct of said city, this defendant would not have paid the said considerations to said Trust Company, or purchased said plant, or had any connection with or relation to said property or said Trust Company. Wherefore, this defendant now here insists that the said city is estopped and can not be heard to allege or pretend that so much of the said works as are South of the South boundary of said city, are not a part of the said plant, and

absolutely essential to the operations of said works and the performance of the public duty resting upon said American Water Works Company.

VIII.

This defendant further answering says that in order to anticipate sudden conflagrations of whatever extent it was incumbent upon the parties who successfully operated said works to provide adequate and efficient measures for supplying an abundant supply of water which could be availed of at any moment. For that reason the reservoir at Walnut Hill and the pumps, mains, and pipes to fill the same were greatly larger than were necessary except in such sudden exigencies. In order to effect the same purpose it was necessary to provide some method for discharging the water collected in said mains and pipes through which the same flowed to the south parts of the city and the most convenient method of doing so was the extension of said pipes and mains to South Omaha where it could be
465 made useful, by means of valves and other appliances effectual provision was made for shutting the water from South Omaha and retaining the whole flow thereof in the pipes and mains in Omaha so as to be available for extinguishing fires occurring there. Such was the purpose of constructing, extending and maintaining such works south of the South boundary of the City of Omaha although incidently provision was made for the necessities of South Omaha and the industries located there.

Wherefore this defendant submits that its works in South Omaha were for the purpose of applying said city and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes.

IX.

On the 2nd of February, 1903 the Legislature of this State passed and the Governor approved an act entitled "An act to provide in cities of the metropolitan class, viz:

1. For the procedure in certain cases, by the mayor and council in the acquisition of a municipal water plant.
2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employes.
3. Penalties for interference with water plant, or employees of water board in the discharge of their duties.
4. For a Water Fund, its revenues, and the disbursement and application thereof.

And amending Sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 100, 101a, 135, 138 and 140 of an act entitled "An Act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An Act incorporating metropolitan cities and defining, regulating and prescribing their duties, powers and government,' approved March 30th, 1887, and all acts amendatory thereof, being Chapter 12a of the Seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled, Cities of the Metropolitan class, approved March 15, 1897, being Chapter 12a of the Tenth

Edition of the Compiled Statutes of the State of Nebraska (edition of 1901) entitled "The Compiled Statutes of the State of Nebraska, 1881 (Tenth Edition) with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler", and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, and repealing said original sections".

This defendant is advised and believes and therefore alleges that the legislature in enacting said statute had in contemplation only the city of Omaha, that being the only city in the state of Nebraska of the metropolitan class, and to which said act was or could be applicable. By the said act, it was made the duty of the mayor and council of a city of the metropolitan class, that is to say, the city of Omaha, to declare by ordinance that it was necessary and expedient for such city to construct or purchase a system of water works; that is to say, the system of water works owned and operated by this defendant and that all other provisions of said act touching the purchase, operation and maintenance of water works in express terms had reference to a system of water works and not a part of such a system, and were applicable to the system of water works owned and operated as hereinbefore set forth of this defendant, as well the part thereof in South Omaha, Florence, Dundee and East Omaha as in the city of Omaha, and this defendant further answering submits that as well the particular clauses terms and provisions of the legislation of the State of Nebraska, the ordinances of the city of Omaha and the whole scope, purpose and effect of such legislation, discover to view a policy to establish a system all parts whereof were related to each other by material duties and service.

VIII.

This defendant admits the allegations contained in the paragraph of the Bill of Complaint numbered X.

IX.

This defendant admits that on the 2nd day of March, 1903, the City of Omaha, in accordance with the provisions of the above entitled act, did pass an ordinance known as Ordinance No. 5162 which ordinance is in the words and figures set forth in the paragraph of the Bill of Complaint numbered XI, and this defendant avers that it was provided by said ordinance that the City of Omaha elected and determined to purchase the entire system of water works operated by this defendant and nothing less; and this defendant alleges that it was the desire and purpose of the City of Omaha in making such election to acquire the entire system of water works operated by this defendant.

X.

467 This defendant admits and avers that in accordance with the provisions of said ordinance No. 423, and in accordance with Ordinance No. 5162 electing and determining to pur-

chase the entire system of water works operated by this defendant under said option contained in said Ordinance No. 423, this defendant appointed George H. Benzenberg, one of the defendants herein, as an appraiser to estimate the value of said water works and the complainant, the City of Omaha, did appoint John W. Alvord, one of the defendants, as its appraiser of said water works, and said appraisers so appointed did choose and select Daniel W. Mead, defendant herein, as third appraiser to appraise and estimate the value of said water works plant for the purpose of the purchase of said system of water works by said city, and this defendant denies that said appraisers were appointed, chosen or selected for any less or other purpose.

This defendant admits that said three appraisers are competent engineers and qualified to act under the terms of said Ordinance No. 423 and said Ordinance No. 5162 as alleged in the paragraph of the Bill of Complaint numbered XII.

This defendant admits and avers that said appraisers did meet and organize as a board of appraisers of the system of water works operated by this defendant on or about the 20th day of July, 1903, and admits and avers that this defendant and the City of Omaha appeared before said board and did present and make such showing as to the properties of this defendant as each of said parties desired, and this defendant avers that the matter of the appraisal of said system of water works was submitted to a Board of Appraisers on or about the 3rd day of January, 1905, and this defendant admits that since said time the said appraisers have been considering and working up their estimate of the value of said system of water works operated and owned by this defendant as alleged in the paragraph of the Bill of Complaint numbered XIII.

XI.

This defendant admits that said Board of Appraisers are without power or authority to subpoena before them witnesses or to compel the production of books and papers in evidence before them, and that under the law there is no provision for any review of the appraisal of said appraisers, either by appeal or error to any of the courts of the State of Nebraska or of the United States, as alleged in the paragraph of the Bill of Complaint numbered XIV, but this defendant denies that said appraisers are without power or authority to determine any or all matters which they may deem necessary or properly involved in estimating and appraising a valuation of the system of water works operated by this defendant, and this defendant denies that said appraisers have power or authority to exclude any items of property embraced in said system of water works from their appraisal of the valuation of said system.

This defendant has no knowledge or information sufficient to form a belief as to whether or not serious or any differences have arisen in or before said board involving questions of law or the construction of the contract under which the said appraisal is being made or involving the question of the powers and duties of said

board under said contract or that the members of said board of appraisers are divided in their opinion upon the construction to be placed upon the said contract or upon the question as to what items of property should properly be included in their estimate of the value of the Omaha Water Works.

This defendant denies that it is making any claims before said board of appraisers or has made any claims before said board except on the open hearings before said board, and denies that any of the contentions of this defendant before said board were purely or solely a question of law.

Further answering this defendant alleges that upon the open hearings before said board of appraisers, the complainant the City of Omaha and the Water Board of the City of Omaha, were represented by counsel and engineers and that such counsel submitted evidence and made oral arguments and submitted printed arguments, and that such oral and printed arguments embraced substantially all the claims made in the Bill of Complaint herein with regard to the scope and nature and elements of the appraisal; and that this defendant was represented on said hearing by counsel and engineers and that such counsel submitted evidence and made oral arguments and submitted printed arguments; and that in the month of January, 1905, the whole matter of the appraisal of the system of water works operated by this defendant was submitted to said board of appraisers for their sole determination; and this defendant is advised and believes and therefore alleges that said board of appraisers have full power and authority to determine all matters deemed by them to be properly involved in the making by them of an estimate and appraisal of a valuation of said system of water works for the purpose of the purchase thereof by the City of Omaha, pursuant to said ordinance of election.

469

XII.

This defendant admits that is contended and claimed before said board of appraisers, and this defendant now contends and claims in this suit, that it is the duty of said board to make an estimate and appraisal of all the property of the Omaha Water plant, comprising the system of water works operated by this defendant wherever located, and that the estimate of the value of said system of water works shall be made in one appraisal without segregation; and this defendant denies that said board of appraisers was appointed to appraise anything less than the entire system of water works operated by this defendant; and this defendant is advised and believes and therefore alleges that the City of Omaha has power in law to purchase and operate water works for the purpose of supplying adjacent cities and communities and their inhabitants with water in connection with supplying the City of Omaha and its inhabitants.

This defendant admits that its pipe systems and connections outside of the City of Omaha and outside of its pumping and its supply system at Florence, are, and are claimed by this defendant to be, as a part of its entire system of water works, of great value, but this defendant denies that they are claimed by this defendant to be of

any specific value; this defendant having made no claim as to the exact money value thereof, but deeming the determination of such value to be the province of the appraisers; and this defendant denies that said pipe system and connections outside of the city of Omaha and outside of its supply system at Florence are of any great value separated from its pumping and supply system and its distribution system in the City of Omaha.

This defendant has no knowledge or information sufficient to form a belief as to whether said board of appraisers have spent much or any time discussing or contending over the question of whether or not they shall include said property which is outside of the City of Omaha, but this defendant admits on information and belief, that, unless restrained by the order of this court, said board of appraisers will make and return one entire appraisal of all the property of this defendant, including that which lies outside of the City of Omaha, all of which this defendant alleges is appurtenant to the system necessary to supplying said City of Omaha and its citizens and inhabitants with water, without segregation therein of the separate systems and connections which are located in South Omaha, East Omaha, Dundee and Florence; and this defendant is advised and believes and therefore alleges that said board of appraisers is in duty bound to make and return such an appraisal.

470 This defendant denies that if such an appraisal is made

and returned in aggregate without segregation of the separate items which constitute the appraisal, and said appraisers shall estimate and appraise in one gross sum the value of all the property of this defendant, including that outside of the City of Omaha, the said estimate and appraisal and award would be null or void or beyond the power or authority conferred upon said appraisers under the terms of their appointment, and the ordinance and contracts in relation thereto; and this defendant is advised and believes, and therefore alleges, that, if said board of appraisers shall fail to include in their appraisal for the purpose of the purchase by the City of Omaha an estimate of the properties outside of the limits of the City of Omaha, constituting a part of the system of water works operated by this defendant, the appraisal of said board and the purchase by said city will be null and void.

On information and belief, this defendant denies every allegation contained in the paragraph of the Bill of Complaint numbered XV not hereinbefore admitted or denied.

XIII.

This defendant denies that it has contended before said board of appraisers or its contnding that said board shall estimate the value of the property to be appraised as of the date of the passage of said ordinance No. 5162; but admits that the complainants are contending that the value of the plant should be fixed and determined as of the date of award, and admits that there may be a difference in value, depending upon the date of the estimate; but this defendant has no knowledge or information sufficient to form a belief as to what such difference will be.

This defendant further denies that it refused to allow said board of appraisers to appoint a suitable expert to prepare schedules of its property, but admits that it did claim the right itself to prepare and submit schedules of such property, and denies that by any excuses or pretenses or otherwise, it delayed its showing or the submission of the appraisal and denies that it is or has been delaying the return of the appraisal by said appraisers by reason of any contentions or insistence before said board whatever; and denies that since the date of the appointment of said appraisers the value of said water works has greatly or at all depreciated or is now depreciating to any extent.

This defendant has no knowledge or information sufficient to form a belief as to whether or not the members of said
471 board of appraisers are unable to agree as to the time as of which the estimates of value shall be fixed, or as to whether or not they are about to, or will unless restrained by order of this court, fix upon the average value during a period of years or will fix or render or award an estimate of value upon an arbitrary term of years, or as to whether or not, if the board shall so fix or determine, the result will be an appraisal largely or at all in excess of the estimate of value if fixed as of the date of the award or of the submission on January 3, 1905, and therefore, this defendant denies the allegations of the Bill of Complaint in that regard.

This defendants denies that said board of appraisers is without power or authority to fix or determine upon the value of the plant through an average period of years and denies that if the award shall be made either as of the date of the appointment of the board of appraisers or as of a term of years, the award will be nugatory or void, or to the damage in any respect of the complainants herein, as alleged in the paragraph of the bill of complaint numbered XVI.

XIV.

This defendant denies that it has presented to said board of appraisers or that it contends that said board shall estimate or return a part of their appraisal or award, without segregation therein or otherwise, the value of any real estate to which this defendant has no right or title. This defendant admits that it owns a pumping plant known as the River Station, located in Block 2, of the City of Omaha, and that it owns at said place lots 1, 2, 3, 4, 5, 6, 7 and 8, in Block 2, and Lots 2 and 6 and the north ten feet of Lots 3 and 7, in Block 328, but denies that it owns no other real estate at said River Station near the intersection of Burt Street and the Missouri River. This defendant admits that it presented to the board of appraisers, and that it contends and claims, that the appraisers shall estimate and appraise as a part of one general appraisal the value of Government Lots 2, 3 and 4 and of the portions of what once were streets surrounding said other lots and blocks owned by this defendant, but this defendant denies that it has no title or claim to said government lots 2, 3 and 4 and what were the streets and alleys surrounding said other lots owned by this defendant, and denies that said property is wrongfully included in the property

which this defendant claims shall be appraised in gross, and denies that said property is claimed by this defendant to be of a value in excess of \$5,000; this defendant deeming the value thereof a matter to be determined by said appraisers. This defendant denies that

472 it has no claim or title to said property and denies that it is or has been occupying the same merely through the permission of the City of Omaha or under or in accordance with any authority or license granted to this defendant under said ordinance No. 423. On the contrary, this defendant alleges that the City Water Works Company of Omaha, by which, as assignee and successor of Sidney E. Locke, the water works were constructed under said Ordinance No. 423, which were accepted by said City of Omaha purchased said Lots 1, 2, 3, 4, 5, 6, 7 and 8 in Block 2 and Lots 2 and 6 and the north ten feet of lots 3 and 7 in Block 328, and built said River Station and its reservoirs and appurtenances on said lots and what has been laid out as streets surrounding the same and on said government lots more than ten years prior to the commencement of this suit, and that said City Water Works Company of Omaha and its successors in interest, including this defendant, have been in the open, notorious and exclusive possession, occupation and use of all said property under claim of title thereto for more than ten years prior to the commencement of this suit and that the fact of such possession was proved before said appraisers on the hearings before them and that no evidence to the contrary was given or offered. This defendant denies that said appraisers have no method of determining the title to said property and denies that no facts upon which a determination of the right to this defendant to said property have been presented to said board of appraisers by this defendant and on information and belief denies that said appraisers are not learned in the law affecting all questions relative to the valuation and appraisement of water works plants and systems. And this defendant denies that if the appraisal or award of the appraisers shall be made in gross without returning a separate estimate of the value of said property, which this defendant denies that it wrongfully claims that any expenses incurred in behalf of the City of Omaha will be lost to the city or the city will be delayed in its right to acquire the works of this defendant.

This defendant, on information and belief, admits that, unless restrained by order of this court, the said appraisers will include in one gross sum in their estimate of the water works belonging to this defendant, the value, as determined by them, of this defendant's interest in said government Lots 2, 3 and 4 and in what were the streets and alleys surrounding the Burt Street Station of this defendant, but this defendant denies that such inclusion will work any injury whatever to the complainants herein or any of them; and this defendant has no knowledge or information sufficient
473 to form a belief as to whether or not said complainants have a remedy at law in said matter, as alleged in the paragraph of the Bill of Complaint number XVII.

XV.

This defendant admits that it claimed before said board of appraisers, and it now claims in this suit, that said appraisers shall include in their award in one gross sum the value of the interest of this defendant in what were once streets and alleys in the City of Florence, but which were vacated as such by said city as alleged in the paragraph of the Bill of Complaint numbered XVIII, but denies that adjoining the reservoirs of this defendant on the east of Florence there is any tract of land over which the Chicago, St. Paul, Minneapolis and Omaha Railway Company has a right of way and this defendant denies that there is any such tract of land as to which this defendant never acquired any title or right except by permission of said railway company, but on the contrary, this defendant alleges that his defendant has full right and title to all land adjoining its reservoirs on the east, and alleges that no part of said land is now owned or in use by said railway company and that there is no conflicting right or title or claim by reason of which the use and value of the plant and property of this defendant at Florence are in any way diminished or impaired.

This defendant denies that no evidence or facts were submitted to the said board of appraisers by this defendant upon which title to said property could be determined; on the contrary this defendant alleges that the fact of the open and notorious possession, occupation and use of said vacated streets and alleys by this defendant under claim of title for more than ten years last past and the facts with regard to the ownership, possession and occupation of all the land east of said reservoirs were submitted to and known by said appraisers. This defendant denies that said board of appraisers is without authority to pass upon or determine the title of this defendant to said vacated streets and alleys in the City of Florence.

This defendant admits that its interest in said vacated streets and alleys and other property was included by this defendant in the list of property to be appraised by said board of appraisers, but denies that it was wrongfully so included, and denies that any specific value therefor was so included, this defendant deeming the value thereof to be a matter for said appraisers to determine.

This defendant, on information and belief, admits that, unless
474 restrained by the order of this court, the said board of appraisers will consider and include in one gross estimate the value of the vacated streets and alleys in the city of Florence adjoining and surrounding the lots and blocks owned by this defendant which vacated streets and alleys are in the possession, occupation and use of this defendant as part of its water works plant and system, without segregation therein, but this defendant denies that if the appraisal or award is so made it will render the entire appraisement of the board of appraisers nugatory or void or that the complainants or any of them will suffer any damage in any way in consequence or any injury whatever, as alleged in the paragraph of the Bill of Complaint numbered XVIII.

This defendant denies each and every allegation in said paragraph except as hereinbefore admitted or denied.

XVI.

This defendant admits that it contended before said board of appraisers at and before the submission of the matter of appraisement, but not otherwise, and is now contends in this suit that said board shall include in one grand total estimate of value without segregation therein, the value of certain lands which are claimed to be owned and which are owned by this defendant and which are described in the paragraph of the Bill of Complaint numbered XIX as the west 25 acres of the south half of the northeast quarter (N. E. $\frac{1}{4}$) of Section 7, township 15, range 13, containing twenty-five acres more or less, situated near Krug's Park in the County of Douglas; but this defendant denies that it has claimed any specific value of said land, deeming the value thereof to be a matter for the determination of said appraisers.

This defendant denies that said land is no part of the water works plant of this defendant and denies that it is not necessary or useful in the operation of said plant; on the contrary, this defendant alleges that said land is a part of said plant and prior to March 2, 1903, was acquired and was and is held for its unique value by reason of its elevation and location for the purpose of a reservoir in anticipation of and provision for the growth of the city of Omaha and the necessity of such a reservoir for the purpose of fire protection, and not for any real estate or speculative purpose or for any purpose apart from its availability for the lawful objects of this defendant and as a part of its system of water works.

This defendant, on information and belief, admits that unless restrained by the order of this court, the said board of appraisers will include in their estimate and report of value, without segregation therein, the value of said tract of land, but this defendant
475 denies that by reason thereof the whole appraisement will be rendered nugatory or void, or that the complainants or any of them will suffer any damage for any reason or suffer any injury whatever as alleged in the paragraph of the Bill of Complaint numbered XIX.

XVII.

This defendant admits that it presented to said board of appraisers as part of the property to be appraised by them, and contended before said board at and before the submission of the matter of the appraisement, although not otherwise, and it now contends in this suit, that said board should appraise the N. 50 ft. of lot 17 and S. 42 ft. and west 10 ft. of N. 50 feet of Lot 18, Block 2 in Armstrong's addition in the City of Omaha, described in the paragraph of the Bill of Complaint numbered XX and include the value of said property in one gross appraisement of the property of this defendant without segregation therein, but this defendant has not contended that there should be no showing of the estimate of value placed upon said property.

This defendant denies that said lots and parcels of land are not in

any way necessary, serviceable or useful in the operation or construction of the water works plant. On the contrary, this defendant alleges that said lands were acquired prior to March 2, 1903, and were acquired and were held for use in connection with the operation and management of the system of water works operated by said defendant and as a part of said system. This defendant on information and belief, — unless restrained by order of this court, the said board of appraisers will include in one gross estimate of value without segregation, the value of said lots and parcels of land, but this defendant has no knowledge or information sufficient to form a belief as to whether or not said board of appraisers will so include said value without any separation of the sum added to the appraisement on account of said property. This defendant denies that the award of said appraisers, if it shall include the value of said property therein will be nugatory or void, and denies that the complainants or either of them will suffer any injury whatever as alleged in the paragraph of the bill of complaint numbered XX.

XVIII.

This defendant admits that it has presented to the said board of appraisers and contended before the said board at and before the submission of the matter of appraisement, although not otherwise, and it now contends in this suit that said board shall make, return and include in the estimate of value, the value of certain lots and parcels of land described in the paragraph of the complaint
476 numbered XXI, to-wit: Block 9, Lot 5, in Block 1, Lot 4 in Block 39, Lots 5, 6, 7 and 8 in Block 38, Lots 6 and 7 in Block 29; Lot 2 in Block 18, Lot 6 in Block 19, Lot 8 in Block 49, and the south half of Lot 4 in Block 51, in the City of Florence, and this defendant insists that the value of these lots shall be included in one total estimate of the works belonging to this defendant without segregation therein, but this defendant denies that it is insisting that such conclusion shall be without any estimate or separate value on said lots by the appraisers. This defendant denies that it has no title to said lots, but admits that said lots are in the reservoirs of this defendant and alleges that this defendant has been in the open and notorious and exclusive possession, occupation and use of said lots under claim of title thereto for more than ten years last past, and that evidence of such facts was presented to the said board of appraisers on the hearing before them.

This defendant, on information and belief, admits that, unless restrained by the order of this court, said board of appraisers will return the value of said lots in their estimate of the value of said water works plant without segregation therein, but this defendant has no knowledge or information sufficient to form a belief as to whether or not such return will be without estimate of the value of said lots. This defendant denies that by reason of the inclusion of such value, the appraisal or award or estimate of value of the said appraisers will be nugatory or void, and denies that the complainants or any of them will be damaged in any respect whatever as alleged in the paragraph of the Bill of Complaint numbered XXI.

XIX.

This defendant denies that in the construction of the water works belonging to this defendant, it has without authority from the city of Omaha or without right entered upon any of the streets or public grounds of the city of Omaha and laid any mains thereon or thereunder for the purpose of supplying water to East Omaha, South Omaha, Benson or Dundee. This defendant admits that by reason of its supplying water to East Omaha, South Omaha and Dundee, it has increased the size of its mains, running through the City of Omaha and this defendant alleges that such increase was made prior to March 2, 1903, and was made in reliance on the claims and conduct of the complainant the City of Omaha with regard to the portions of the system of water works owned and operated by this defendant in said places, as hereinbefore set forth. This defendant admits that it claimed before the said board of appraisers at and before the submission of the matter of appraisalment, although not 477 otherwise, and it now claims in this suit, that said board of appraisers shall include in their estimate of value without deduction, the additional value of said increased size of mains made necessary by its supplying water through the same so placed adjacent to the city of Omaha, but this defendant denies that it claims or has claimed that the cost of the said increased size of mains as such should be so included.

This defendant denies that said increased size of mains does not add to the value of the water works necessary for supplying the city of Omaha and its citizens and inhabitants with water; on the contrary, this defendant alleges that such increased size of mains is highly useful and beneficial to said water works and adds very greatly to their value by increasing their efficiency for fire protection within the city of Omaha, and their capacity for distributing surplus water at a large profit to adjacent communities.

This defendant admits that said increased cost or value will add to the estimate of value to be fixed by the appraisers in a large sum, but this defendant has no knowledge or information sufficient to form a belief as to how large such sum will be, and this defendant on information and belief, admits that said board of appraisers, unless restrained by the order of this court, will include in their appraisalment, without segregation, but as a part of the total appraisalment, the value of any mains which have been so laid in the streets of the City of Omaha for the purpose of supplying South Omaha, East Omaha and Dundee, and the increased size of any mains which have been increased in size for the aforesaid purpose; but this defendant denies that such inclusion will be without right or authority of law and denies that thereby the appraisalment of said board will become nugatory or void, and denies that the complainants or any of them will suffer any damage in any way as alleged in the paragraph of the Bill of Complaint numbered XXII.

XX.

This defendant admits that it has contended before the board of appraisers, at and before the submission of the matter of the appraisal-

ment, although not otherwise, and it now contends in the suit, that said board shall include in its estimate of the value of the Omaha Water Works the value of a certain pumping station known as the Poppleton Avenue Pumping Station; but denies that said station was erected solely or primarily for the purpose of assisting in supplying water to the City of South Omaha, and denies that it is not necessary or useful to the supplying of the City of Omaha with water, and denies that it was not erected under and by virtue of the

478 terms of Ordinance No. 423; and alleges that said pumping station was primarily erected for the purpose of more adequately supplying with water for fire protection and domestic use, the portions of the City of Omaha known as Kountze's Addition and the high grounds in that vicinity, and alleges that said station was constructed long prior to March 2, 1903, and that it is an integral part of the system of water works operated by this defendant, and that its maintenance and operation are useful and necessary to the supplying of the City of Omaha with water for fire protection and its inhabitants with water for domestic purposes.

This defendant admits that said pumping station is claimed by this defendant to be of large value, although this defendant has not placed a specific valuation thereon, deeming that to be the province of the appraisers, but on information and belief, admits that, unless restrained by the order of this Court, the said board of appraisers will include in their estimate of value of the Omaha Water Works without segregation therein, the value of said Poppleton Avenue Pumping Station; but this defendant has no knowledge or information sufficient to form a belief as to whether or not said board will make a separate estimate of its value; and this defendant denies that by reason of such inclusion the appraisal or award or estimate of the appraisers will be rendered nugatory or void, and denies that the complainants or any of them will suffer any loss or damage whatever as alleged in the paragraph of the Bill of Complaint numbered XXIII.

XXI.

This defendant denies that in the construction of said plant belonging to this defendant, this defendant or any predecessors in the ownership of said plant, has expended large sums or any sums of money uselessly or extravagantly in building land out into the Missouri River in front of its reservoir near Florence; but this defendant admits that it has claimed and contended before the board of appraisers at and before the submission to them of the matter of the appraisement, although not otherwise, and it now claims and contends in this suit, that said board shall return as a part of their appraisal and award without segregation therein, the value of the construction made at Florence for the protection of the basins and water supply from encroachment and damage by the Missouri River; but this defendant denies that it has ever claimed that such value should be so returned without a separate valuation, and denies that any of such river protection or any extension of land made by this defendant or its predecessors in ownership into said river was un-

479 necessary or useless or is not a part of the construction of said water works. This defendant admits that it has contended and it now contends as aforesaid, that there should be included in the estimate of value without segregation therein, a large sum for such river protection and so much of any extension of land into the Missouri River as is a part thereof, although this defendant has not specified such sum, deeming the determination thereof to be the province of the appraisers. This defendant denies that adequate protection against the encroachments of the river could have been furnished or made for \$60,000, and denies that a solid masonry wall laid to bed rock in front of said reservoirs with complete or adequate protection could have been made at a cost of not to exceed \$200,000, and denies that any expenditure in the extension of land into the Missouri or in the protection otherwise of said water works at Florence against the encroachments of the river, has been uselessly or fraudulently made, and denies that the cost of construction thereof bears no proportionate relation to the value thereof.

This defendant, on information and belief, admits that, unless restrained by the order of this court, the said appraisers will award and return as a part of their estimate of value a large sum on account of said river protection and that such sum may be based in a measure upon the estimated cost of the reconstruction of such river protection, but this defendant denies that if an appraisal or award is made, based upon the cost of the re-construction of such river protection, including any extension of land into the Missouri River, the entire award of the appraisers will be rendered nugatory or void; and this defendant denies that the complainants or any of them will suffer any loss whatever as alleged in the paragraph of the Bill of Complaint numbered XXIV; and except as hereinbefore admitted or controverted. This defendant denies every allegation contained in said paragraph.

XXII.

This defendant admits that it has contended before the said board of appraisers at and before the submission of the matter of the appraisement, although not otherwise, and it now contends in this suit, that said board shall, as a part of the valuation of the system of water works operated by this defendant, include in their estimate of value, a large sum for what is termed the going value of said plant and system, but this defendant has made no contention before said board as to what that sum should be, deeming the determination thereof to be the province of the appraisers; although this defendant contends in this suit that such going value amounts to more than a million dollars.

480 This defendant denies that under and by virtue of the terms of said Ordinance No. 423 or otherwise, the said board of appraisers is without authority or power to allow or include in its estimate of value, any sum whatever for what is termed going value, and denies that said board of appraisers is without power or authority to secure the evidence upon which going value could be estimated in any case, and denies that this defendant has failed or refused to present to said board of appraisers the showing of any of its receipts

or disbursements or profits necessary to the determination of the going value; this defendant alleges on the contrary, that this defendant has placed all its books, papers and accounts at the disposition of said appraisers of any and all purposes of their appraisal.

This defendant admits, on information and belief, that unless restrained by the order of this court, the said board of appraisers are about to and will return as a part of the total estimate of the value of said system of water works, a large sum, without segregation therein, for what is termed the going value, but this defendant has no knowledge or information sufficient to form a belief as to whether or not said board of appraisers will return such estimate of such going value without a separate statement of the amount thereof; and this defendant denies that if the appraisal or estimate or award of said appraisers is so returned and such going value is included therein, the whole appraisal, estimate of value or award will become nugatory or void; and denies that the complainants or any of them will suffer any loss whatever as alleged in the paragraph of the Bill of Complaint numbered XXV.

XXVIII.

This defendant denies each and every allegation contained in the first paragraph of the subdivision of the Bill of Complaint numbered XXVI.

This defendant denies that pending the appraisement this defendant is refusing to comply with the terms of said Ordinance No. 423, as alleged in the second paragraph of said subdivision, and, on information and belief, denies that there is in the City of Omaha, an imperative necessity that the mains of this defendant be extended and hydrants erected thereon, and denies that whole streets have been opened and houses constructed thereon in reliance upon the right to secure water under the terms of said Ordinance No. 423, which are now, without fault on the part of said city, without means of securing water for domestic use — for fire protection, and denies each and every other allegation contained in said paragraph.

481 This defendant, further answering, alleges that the complainant the City of Omaha has failed and refused and neglected to pay to this defendant any part of the hydrant rentals due to this defendant on January 1, 1905, under said ordinance No. 423, and under said contract of July 20, 1880, or any part of the hydrants rentals due to this defendant on July 1, 1905 under said ordinance and contract and has violated the terms of said contract on the part of said city to be observed and performed, and is without equity to require of this defendant pending such default, the extension of mains and the erections of hydrants thereon.

This defendant denies each and every allegation contained in the third and last paragraph of said subdivision of the Bill of Complaint immediately preceding the prayer of the bill, and this defendant submits to this honorable Court, that the matters in the said complainant's bill mentioned and complained of do not constitute any case with respect to which the said complainant is entitled to relief from this Honorable Court. And this defendant prays that it

have the same benefit of this defense as if it had demurred to the said complainant's bill.

And this defendant denies all unlawful combination or confederacy in the said bill charged, without that any other matter or thing material for this defendant to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays to be hence dismissed with its reasonable costs and charges in that behalf most wrongfully sustained.

R. S. HALL,
Sol. for Def't.

HOWARD MANSFIELD,
J. M. WOOLWORTH,
Of Counsel.

DISTRICT OF NEBRASKA, ss:

Edmund M. Fairfield being duly sworn, says that he is General Manager of the defendant in the above bill, and that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated on information and belief and as to those matters, he believes it to be true.

EDMUND M. FAIRFIELD.

482 Subscribed and sworn to before me, this 4th day of September, 1905.

[SEAL.] FANNIE M. PRATT,
Notary Public, Douglas County, Nebraska.

Jan. 14, 1908.

Endorsed: Filed Sep. 4, 1905. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: There was offered in evidence in the case of the Omaha Water Company, vs. The City of Omaha, No. 74 Docket "X", the Testimony filed November 6, 1905, in the case of The Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., No. 209, "W", excepting from said offer the Testimony of E. M. Fairfield, and an agreement to use the depositions of W. J. C. Kenyon, Patrick J. Sheehy and R. C. Howell, which said Testimony with the said exceptions is in the words and figures following, to-wit:

In the Circuit Court of the United States, Within and for the District of Nebraska.

No. 209, Docket "W."

THE CITY OF OMAHA and THE WATER BOARD OF THE CITY OF OMAHA, Complainants,

vs.

DANIEL W. MEAD et al., Respondents.

Testimony taken on behalf of the Complainants, the Water Board of the City of Omaha and the City of Omaha, under the sixty-seventh rule of the Supreme Court, as amended, pursuant to notice heretofore issued and served upon counsel for respondents herein; said testimony beginning on Monday, October 30th, 1905, at 9:30 o'clock A. M., at Room 826, New York Life Building in the City of Omaha, Douglas County, Nebraska, before me, Charles W. Pearsall, an Examiner in Chancery of the United States Circuit Court for the District of Nebraska.

Present: John L. Webster, Esq., C. C. Wright, Esq., Solicitors for Complainants.

James M. Woolworth, Esq., R. S. Hall, Esq., Solicitors for Respondents.

Proceedings were as follows:

Complainants first offered in evidence the report of J. D. Cook as set forth in the compiled ordinances of the City of Omaha for the year 1890, and as referred to in the pleadings.

483 The report referred to is marked "Exhibit 1."

Mr. HALL: That is objected to for the reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under the bill.

It is agreed between counsel for the respective parties that the printed report of J. D. Cook and appendix thereto as found in the compiled ordinances of the City of Omaha for the year 1890 may be used by either party upon any argument, and that the said report need not be extended in the transcript of this case.

The Complainant's next offer in evidence, Ordinance No. 423 of the City of Omaha, passed June 11, 1880.

The Ordinance referred to is marked "Exhibit 2."

Mr. HALL: That is objected to for the reason that there is no jurisdiction to offer any testimony in this case and for the further reason that the same is not material under the bill.

It is agreed between counsel for the respective parties that the printed ordinance No. 423 of the City of Omaha as above referred to, as found in the compiled ordinances of the City of Omaha, may be used by either party upon any argument, and that the said ordinance need not be extended in the transcript of this case.

Complainants next offer in evidence, Ordinance No. 430 found in the compiled ordinances of the City of Omaha for the year 1890.

The Ordinance referred to is marked "Exhibit 3."

Mr. HALL: That is objected to for the reason that there is no jurisdiction to offer any testimony in this case and for the further reason that the same is not material under the bill.

It is agreed between counsel for the respective parties that the printed ordinance No. 430, found in the compiled ordinances of the City of Omaha for the year 1890, as above referred to, may be used by either party upon any argument and that the said ordinance need not be extended in the transcript of this case.

Complainants now offer in evidence the contract between the City of Omaha and Sidney E. Locke, approved July 20, 1880 and printed in the compiled ordinances of the City of Omaha for the year 1890.

The same is marked "Exhibit 4."

484 Mr. HALL: That is objected to for the reason that there is no jurisdiction to offer any testimony in this case and for the further reason that the same is not material under the bill.

It is agreed between counsel for the respective parties that the printed contract above referred to, as found in the compiled ordinances of the City of Omaha for the year 1890 may be used by either party upon any argument and that the said contract need not be extended in the transcript of this case.

Plaintiffs now offer in evidence Ordinance No. 445 of the City of Omaha, passed Nov. 9, 1880, and approved Nov. 11, 1880.

The same is marked "Exhibit 5."

Mr. HALL: That is objected to for the reason that there is no jurisdiction to offer any testimony in this case and for the further reason that the same is not material under the bill.

It is agreed between counsel for the respective parties that the printed ordinance No. 445, found in the compiled ordinances of the City of Omaha, as above referred to, may be used by either party upon any argument and that the said ordinance need not be extended in the transcript of this case.

Complainants next offer in evidence Ordinance No. 618 of the City of Omaha passed August 28, 1783, approved Sept. 4, 1883.

The ordinance referred to is marked "Exhibit 6."

Mr. HALL: That is objected to for the reason that there is no jurisdiction to offer any testimony in this case and for the further reason that the same is not material under the bill.

It is agreed between counsel for the respective parties that the printed ordinance No. 618 found in the compiled ordinances of the City of Omaha, as above referred to, may be used by either party upon any argument and that the said ordinance need not be extended in the transcript of this case.

The Complainants next offer in evidence, a franchise to the American Water Works Company granted by the City of South Omaha, being ordinance No. 29, of the City of South Omaha, approved October 17, 1887.

The same is marked "Exhibit 7."

Mr. HALL: That is objected to as being incompetent and for the further reason that there is no jurisdiction to offer
485 any testimony in this case and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 7, being the franchise referred to last above, is as follows:

Ordinance No. 29.

An ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago, Ill. for the term of seventeen years.

Be it ordained by the Mayor and Council of the City of South Omaha, Douglas County, Nebraska.

Sect. 1. That the exclusive right is hereby granted to the American Water Works Company of Chicago, Illinois, for the term of seventeen years to lay and operate a system of water works in the streets, alleys and public places in said City connected with the present system [on] the City of Omaha for and in consideration of the right to have the uses of water on agreed terms that may now exist or hereafter exist in the City of Omaha as furnished by this company for fire and domestic purposes.

This ordinance to take effect from and after its passage, approval and publication.

FRED M. SMITH,
Act- Mayor.

Attest:
E. K. WELLS, *City Clerk.*

We, the Ordinance Committee recommend the passage of the within.

F. M. SMITH.
A. GARY.
D. RAFFERTY.

SOUTH OMAHA, *July 28, 1905.*

I certify that the above is a true and correct copy of the original Ordinance No. 29.

JOHN J. GILLIN,
City Clerk."

Complainants next offer in evidence Ordinance No. 1154
486 of the City of South Omaha, passed and approved August
25, 1903.

The same is marked "Exhibit 8".

Mr. HALL: This is objected to as being incompetent and for the further reason that there is no jurisdiction to offer any testimony in this case and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 8, being the ordinance referred to last above, is as follows:

"Ordinance No. 1154.

An Ordinance authorized and making a contract between the City of South Omaha and the Omaha Water Company for a water supply for a period of ten years from and after the 17th day of October 1904.

Be it ordained by the Mayor and City council of the City of South Omaha, as follows:

That the contract now existing between the City of South Omaha and The Omaha Water Company, be and the same is hereby extended for the supplying and furnishing of water to the public and private consumers within said city, for the period of ten years, namely; from the 17th day of October 1904, to the 17th day of October 1914, upon the same terms and conditions as now existing between said Company and said City.

The said Water Company shall pay to the said city as an annuity One thousand dollars (\$1,000.00) per annum during the year 1903, and Two Thousand Five Hundred Dollars [(\$2,500.00)] per annum after the year 1903, and during the existence of this contract.

The Water Company shall, within ten days after the passage of this Ordinance, file its acceptance of this ordinance, and said Ordinance shall thereupon become a contract between the said City of South Omaha and the said Omaha Water Company for the supplying and furnishing of water to the public and private consumers of the City of South Omaha for the period of ten years from October 17th, 1904, at the rate and upon the terms and conditions herein set forth.

Passed Aug. 25th, 1903.

S. C. SCHRIGLEY,

City Clerk,

By F. BURNES, JR.,

Deputy City Clerk.

487 Approved: Aug. 25th, 1903.

FRANK KOUTSKY, *Mayor.*

Introduced by W. H. Queenan.

So. OMAHA, *July 28th, 1905.*

I hereby certify that the above is a true and correct copy of the original ordinance No. 1154.

JOHN J. GILLIN, *City Clerk."*

Complainants next offer in evidence Ordinance of South Omaha, Number 1181, said ordinance being approved November 30, 1903. The same is marked "Exhibit 9".

Mr. HALL: This is objected to for the reason that the same is incompetent, and for the further reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 9, being the ordinance referred to last above is as follows:
(See next page.)

EXHIBIT "9."

Ordinance No. 1181.

An ordinance amending Ordinance No. 1154, entitled, "An Ordinance authorizing and making a contract between the City of South Omaha and the Omaha Water Company for a water supply for a period of ten years from and after the 17th day of October 1904."

Be it ordained by the Mayor and the City Council of the City of South Omaha, as follows:

That the ordinance of said city of South Omaha, numbered 1154, entitled "An ordinance authorizing and making a contract between the City of South Omaha and the Omaha Water Company for a water supply for a period of ten years from and after the 17th day of October, 1904," be and the same is hereby amended by adding thereto the following provisions:

It is further provided that, if the said Water Company shall, upon the request of the said city, erect and maintain, at such location within said city as the City Council of said city shall designate, additional hydrants, not exceeding sixteen hydrants during the year 1903, and twenty additional hydrants during the year 1904 and supply said city with water therefrom, the annuity hereinbefore provided for shall be reduced at the rate of sixty dollars per annum for each of said hydrants during the existence of said contract."

This ordinance shall take effect and be in force after its passage, approval and publication.

Passed Nov. 30th, 1903. Introduced by W. H. Quenenan.

S. C. SCHRIGLEY, *City Clerk.*

Approved: Dec. 1st, 1903.

FRANK KOUTSKY, *Mayor.*

SOUTH OMAHA, *July 28th, 1905.*

I hereby certify that the above is a true and correct copy of the original Ordinance No. 1181.

JOHN J. GILLIN, *City Clerk.*

Endorsed on back: South Omaha Ord. No. 1181. Amending Ord. No. 1154. Contract City of So. Omaha, with Omaha Water Company. Passed Nov. 30, 1903. Approved Dec. 1, 1903. Introduced by Mike Smith. Recorded in Book 3 of Ordinances page 111.

EXHIBIT No. 9, C. W. P.

Complainants next offer in evidence an ordinance of the City of Florence, being the franchise running to the American Water Works Company, passed August 13, 1889.

The same is marked Exhibit 10.

Mr. HALL: This is objected to as being incompetent and for the further reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 10, being the ordinance last above referred to, is as follows:

(See next page.)

An Ordinance to procure a supply of water for the City of Florence and its inhabitants, for fire and domestic purposes, and to contract with the American Water Works Company therefor.

489 Be it ordained by the Mayor and Council of the City of Florence:

SECTION 1. The right, privilege and franchise to use the streets, lanes, alleys and public places of the City of Florence for the purpose of laying down, maintaining, repairing and renewing water mains and pipes, hydrants and valves, is hereby granted to The American Water Works Company, its successors and assigns.

SECTION 2. The American Water Works Company shall, within three months after the passage of this ordinance, lay down water pipe in the streets of said Florence as follows, viz: On State street, from Fourth street to Prospect street, and on Main Street, from Monroe street to Calhoun street, and shall set thereon twelve (12) double hydrants at the following points and places, viz:

One at the northeast corner State and South streets.

One on northeast corner of State and Main streets.

One on northwest corner of State and Fifth streets.

One on northwest corner of State and Bluff streets.

One on northeast corner of State and Prospect streets.

One on southwest corner of Madison and Main streets.

One on southwest corner of Harrison and Main streets.

One on southwest corner of Monroe and Main streets.

One on northwest corner of Willet and Main streets.

One on northwest corner of Jefferson and Main streets.

One on northwest corner of Clay and Main streets.

One on northwest corner of Calhoun and Main streets.

And the said company shall hereafter extend its mains and set hydrants thereon whenever ordered so to do by the city council of the City of Florence; provided, however, that no such extensions shall be made unless a hydrant is ordered for each four hundred feet of extension.

SECTION 3. The City of Florence hereby rents of the said The American Water Works Company the right to use said twelve hydrants, and such other hydrants as it may from time to time order to be set during the whole term of fourteen years from the first day of September, 1889, and will pay therefor the sum of sixty dollars per annum for each alternate hydrant, from the respective days when such hydrants may be respectively set and ready for use for the first five years ensuing September 1st, 1889; and the sum of sixty dollars per annum for each of said hydrants for the remainder of said term of fourteen years, payable annually on the first day of July in each year at the office of the company in the City of Florence.

490 SECTION 4. The said Company or its assigns shall, during the whole term of said fourteen years, keep said main, pipes and hydrants, mentioned in Section 2 hereof, and such additional mains, pipes and hydrants as shall be ordered and set under the terms hereof, at all times supplied with water from its main pipe or pipes leading to the City of Omaha from its pump house in Florence, and shall at all times keep and maintain such mains, pipes and hydrants in good order and repair, unavoidable accidents excepted.

SECTION 5. Water shall be supplied during said term of fourteen years free of charge by the company for drinking and washing purposes at each public school which shall be maintained in the City of Florence, and for four public drinking fountains for man and beast, to be furnished and set by the company, and connections made by the company.

SECTION 6. The said company and its assigns shall furnish water to citizens residing along the line of said mains, at the prices now fixed by ordinance in the city of Omaha, under such rules as the company now has governing connections with its mains and the use of water by private consumers in the city of Omaha. The Company shall be at liberty to inspect any service, or service pipe at any reasonable hour, to stop waste of water to reject any service pipe as unsuitable and to regulate the use of water by all usual and customary regulations.

SECTION 7. Should the price of hydrant rental at any time during said term be reduced in the city of Omaha, then the same reduction shall be made in Florence for the remainder of the unexpired term, on the city of Florence complying with the same terms which may be the consideration of such reduction in Omaha.

SECTION 8. The City shall be responsible for any injury occasioned to any main, pipe or hydrant by any officer, agent or servant of the city. The city shall designate annually certain persons who shall be permitted to open and close fire hydrants, and then only in case of an alarm of fire. And the city shall, by ordinance, protect the property of the company from injury by trespassers, and its water supply free from pollution to such an extent as may be possible.

SECTION 9. The company shall hold the city harmless of and free from any damage caused to person or property on account of any excavation by the company in the streets and public places of the city.

SECTION 10. Whenever the said company shall at any time make any excavation in the streets of Florence for the purpose
 491 of laying or re-laying, repairing or renewing any pipe, valve, main or hydrant, the said company shall restore the same to as good condition as the same was in previous to any such excavations. And upon any failure so to do, for thirty days succeeding notification of that fact, from the city council of the said city, the said city may proceed to restore the said street at the expense of the company.

SECTION 11. The city shall establish grades for all of its streets upon which it may by this ordinance or at any time hereafter order the laying of any pipes by the said company, and the said company shall either lay its pipes so as to conform to the grade line so established, or, whenever the street is actually graded, cause the said pipe to be laid to conform to the grade line so established, without expense to the city; causing any excavation it shall make in doing such work to be restored, and the street to be put in as good order as if the said company had originally laid its pipe to conform to grade. It is understood, that all pipes laid in the city shall have a covering of at least four and one-half feet of earth.

SECTION 12. Upon the acceptance of this ordinance in writing, signed by the president or secretary of the company, under the seal of the company, the same shall become a contract between the city and the company.

SECTION 13. This ordinance shall take effect and be in full force from and after its passage.

Mr. Christina	Yea.
Mr. Walker	Yea.
Mr. King	Yea.
Mr. Brown	Yea.

Passed August 13, 1889.

J. WEBER,
City Clerk.
 H. HARE, *Mayor.*

STATE OF NEBRASKA,
County of Douglas, City of Florence, ss:

I, J. Weber, City Clerk of the said City of Florence, do hereby certify that on the 17th day of August, A. D. 1889 I posted in each of three public places in the said city a written copy of an ordinance of which the annexed is a true and compared copy. That said ordinance was duly passed by the City Council of the said city on the 13th day of August, 1889, and was approved by the mayor of said city on said day. That the same was unanimously passed by the said council.

492 And I further certify that there is no newspaper published in the said city of Florence, and that the publication of the said ordinance has been made by posting the same as aforesaid.

In Witness Whereof, I have hereunto set my hand and caused the seal of the said city of Florence to be hereto affixed this seventeenth day of August A. D. 1889.

[SEAL.]

J. WEBER,
City Clerk.

End of Exhibit 10.

Complainants now offer in evidence Ordinance Number 160 of the city of Florence, amendatory of the ordinance of August 13, 1889 (marked exhibit 10 in this case), said ordinance Number 160 being approved on the 14th day of November, 1903.

The same is marked Exhibit 11.

Mr. HALL: This is objected to as being incompetent, and for the further reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 11, being the ordinance last above referred to, is as follows:

(See next page.)

Ordinance No. 160.

An Ordinance Amending Sections Three, Four, Five, Six and Seven of an Ordinance Entitled: "An Ordinance to Procure a Supply of Water for the City of Florence and Its Inhabitants and to Contract with the American Water Works Company for a Supply for Fire and Domestic Purposes."

Approved Aug. 13, 1889, and repealing said sections three, four, five, six and seven of said original ordinance.

Be it Ordained by the Mayor and Council of the City of Florence:

SEC. 1. That section three of an ordinance entitled: "An ordinance to procure a supply of water for the City of Florence and its inhabitants and to contract with the American Water Works Company for a supply for fire and domestic purposes," be and the same is hereby amended so as to read as follows:

SEC. 3. "The city of Florence hereby rents of the Omaha Water Company (which is the successor of the American Water Works Company) the right to use any of the 13 hydrants, now set
493 and such other hydrants as it may from time to time order to be set during the whole term of 25 years from the day of the approval of this ordinance, and will pay therefore the sum of sixty (\$60) dollars per annum for each hydrant now set, from the first day of July 1903, and sixty (60) dollars per annum for each additional hydrant from the respective days when such hydrant may respectively be set and ready for use during the said term of 25 years, payable on the 1st day of July of each year, at the office of said company in the city of Florence.

SEC. 2. That section four of said ordinance, of which this is an amendment, be and the same is hereby amended so as to read as follows:

SEC. 4. The said Omaha Water Company, its successors and assigns, shall during the said term of 25 years, keep said mains, pipes and hydrants, and such additional mains, pipes and hydrants as shall be ordered and set under this ordinance and the ordinance of which this is an amendment, at all times supplied with water from its main pipe or pipes leading to the City of Omaha from its pump house in Florence and shall at all times keep and maintain such mains, hydrants and pipes in good order and repair unavoidable accidents excepted.

SEC. 3. That Section five of said ordinance of which this is an amendment be, and the same is hereby amended so as to read as follows:

SEC. 5. "Water shall be supplied during said term of years free of charge by the said Omaha Water Company for drinking and washing purposes at each public school, which shall be maintained in the city of Florence, and for four public drinking fountains for man and beast, to be furnished and set and maintained by said company."

SEC. 4. That Section six of the said ordinance of which this is an amendment be, and the same is hereby amended so as to read as follows:

SEC. 6. "The said Omaha Water Company, its successors and assigns shall furnish water to citizens or residents residing along the line of said mains, at the prices now fixed by ordinance in the City of Omaha under such rules as said Company now has governing connections with its mains, and the use of water by private consumers in the City of Omaha, and should the price of water to private consumer be reduced in the City of Omaha, at any time during said term, then the same reduction shall be made in the City of Florence to private consumers for the then remainder of the unexpired term.

494 "The said Company shall be at liberty to inspect any service or service pipes, at any reasonable hour, to stop waste of water, to reject any service pipes if unsuitable, and to regulate the use of water by all usual and customary regulations."

SEC. 5. That section seven of the said ordinance of which this is an amendment be, and the same is hereby amended so as to read as follows:

SEC. 7. "Should the price of hydrant rentals at any time during said term, be reduced in the City of Omaha, then the same reduction shall be made in the City of Florence, for the then remainder of the unexpired term."

SEC. 6. That sections three, four, five, six and seven of an ordinance entitled: "An ordinance to procure a supply of water for the City of Florence and its inhabitants and to contract with the American Water Works Company for a supply for fire and domestic purposes" approved Aug. 13, [1899], be, and the same hereby are repealed.

SEC. 7. That this ordinance shall take effect and be in force from and after its passage and publication as required by law, and upon its acceptance by the Omaha Water Company.

Passed and approved this 14th day of November, 1903.

J. S. PAUL, *Mayor*.

Attest:

M. E. TUTTLE,
City Clerk.

I, M. B. Thompson, Clerk of the City of Florence, Douglas County, Nebraska, do hereby certify that the above and foregoing three pages is a true and correct copy of Ordinance No. 160, which was passed and approved by the Mayor and council of the City of Florence, Nebraska, on the 14th day of November, 1903, as shown by the original thereof now on file in my office.

I further certify that said ordinance was published for two successive weeks after its passage in the Florence Items, a newspaper of general circulation in the City of Florence, Nebraska, and as required by law.

That said ordinance No. 160 is now in full force and effect.

Witness my hand at Florence, Nebraska, this 27th day of October, 1905.

M. B. THOMPSON,
Clerk of the City of Florence, Nebraska.

End of Exhibit 11.

495 Complainant now offers in evidence the contract between the American Water Works Company and the East Omaha Land Company, under date of August 8, 1890.

The same marked Exhibit 12.

Mr. HALL: This is objected to as being incompetent, and for the further reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under this bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 12, being the ordinance last above referred to, is as follows, see next page:

This agreement made and entered into this 8th day of August, A. D. 1890, by and between the East Omaha Land Company, a corporation organized under the laws of the State of Nebraska, party of the first part and The American Water Works Company, a corporation, organized under the laws of the state of Illinois, owners of and operating the works whereby the cities of Omaha, and South Omaha, Nebraska, are supplied with water, party of the second part, witnesseth:

Whereas, the first party is the owner of:

- All of section twenty-one (21), township seventy-five (75) range forty-four (44), Pottawattamie County, Iowa, excepting the south-west quarter of the southwest quarter of said section twenty-one (21).

All of the west one-half of section twenty-two (22) township sev-

enty-five (75) range forty-four (44) Pottawattamie County, Iowa, excepting the southeast quarter of the northwest quarter of said section twenty-two (22).

The west one-half of the northeast quarter of section twenty-two (22), same township and range as above.

The northwest quarter of the southeast quarter of section twenty-two (22), same township and range as above.

Government lot one (1), section twenty-two (22) same township and range as shown by the government survey.

Government lot one (1), section twenty (20), same township and range as shown by government survey.

Government lot one (1), section sixteen (16), same township and range as shown by the government survey.

496 Government lot one (1), section seventeen (17), same township and range as shown by government survey.

The northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section twenty-eight (28) same township and range as shown by government survey.

All of government lot three (3), section twenty (20) same township and range, lying north of the east and west center line of the southwest quarter of section twenty-one (21), township seventy-five (75), range forty-four (44), extended west.

Government lot nine (9), in section one (1), township fifteen (15), range thirteen (13), east of the sixth P. M., in Douglas County, Nebraska, as shown by the government survey.

Government lots one (1), two (2), three (3) and four (4) in section two (2), same township and range as shown by government survey.

Also,

Commencing at a point where the Iowa Meander line of the Missouri River, as surveyed in 1851, intersects with the east and west center line of the southwest quarter of section twenty-one (21), township seventy-five (75), range forty-four (44), west of the fifth P. M., extended west; thence north and easterly along said Meander line to the northeast corner of said section twenty-one (21); thence north to a point on the Nebraska Meander line, as surveyed in 1856; thence westerly and southerly along said Meander line to a point directly west of the place of beginning; and thence east to the place of beginning; a part of which said lands have been laid out in lots, streets and alleys by the said first party, and the said streets, alleys and public places are the property of the said first party; and

Whereas, The first party is desirous that the second party shall extend its water mains into, upon and through the streets, alleys and public places of said land, and furnish water therein, and the second party is willing to do so, upon the terms and conditions hereinafter mentioned, provided it can obtain a grant from the first party of the right to use all and singular the said streets, lanes and alleys and public places, or any extensions thereof, of said East Omaha Land Company, and can be assured of the permanency of its business therein:

Now, therefore, in consideration of the premises and of divers other

497 good and valuable considerations, and of the mutual grants, covenants and agreements hereinafter contained, the said parties do hereby agree to and with each other as follows, to-wit:

First. The said first party doth grant and convey to the said second party the right and privilege to lay down, maintain, repair, relay and replace, water pipes, valves, hydrants and other apparatus for the distribution of water, in, upon, along, and through all and singular the streets, lanes, alleys and public places now laid out upon the said premises, according to a plat thereof hereto attached, and upon any extensions thereof upon the said premises which may hereafter be made.

Second. The said first party doth covenant, grant, bargain and agree, that it will not grant to any other person or corporation, save the second party, its successors or assigns the right or privilege granted to the second party in the first section hereof, excepting that nothing in this paragraph contained shall in any way interfere with the right of persons to lay pipe for connection with the mains of said second party.

Third. In case of any filing of any plat of said lands, or the dedication of the streets or other public places to public use, it shall be with the preservation of all the rights of the second party therein which have been hereinbefore granted and covenanted; and in case of the incorporation as a municipality of said lands or any part thereof, it shall be with a singular preservation of all the rights of the second party therein.

Fourth. The said second party shall, whenever directed so to do, by an order signed by the president and secretary of the first party, under the seal of the first party, lay [or] lines of pipes from its system in the city of Omaha to the intersection of Locust Avenue and Ninth street to such other point or points upon the premises of said first party as may be directed. From the intersection of Locust Avenue and Ninth street, one fire hydrant shall be ordered for every four hundred (400) feet of extension, and whenever an extension is ordered to the eastward of Ninth street, one fire hydrant shall be ordered for each four hundred feet of extension. But on the extension from the present system of pipes in Omaha to the said intersection of Locust Avenue and Ninth street, no fire hydrants need be ordered.

498 Upon every extension on the premises of said first party the pipes shall be laid in the shortest reasonable possible time after the order is received by the second party, and always by the most direct route, following the line of the streets, to reach the point to which the extension is ordered. The said extensions to be made, and fire hydrants set without cost to the first party. The signature of the president and secretary of the said first party, with its corporate seal, shall be conclusive evidence to the second party that the extension therein ordered is made by authority. It is understood and agreed, however, that no extension need be made from the present system, under the terms of this section, unless there is ordered east of the intersection of Locust Avenue and Ninth street at least one mile of pipe.

Fifth. All extensions in streets or other public places shall be made with care, and the said second party shall, as soon as possible after the making of any excavation in any of the streets or other public places as aforesaid, for any of the purposes aforesaid, cause the same to be filled up and the streets to be restored as nearly as possible to the condition that they were in before any such excavation. And in case of any failure so to do after twenty-four hours after being notified by any officer of the first party having charge of its streets, such restoration may be made by the first party at the expense of the second party; and the said second party shall save and keep the said first party harmless of and from all loss, cost or damage to person or property, on account of any negligence of the second party in the excavation of any such streets or other public places.

Sixth. The said second party shall suffer and permit connections to be made with the mains and pipes by the owners of any property abutting upon any street where any pipe is laid, for the purpose of drawing water therefrom, under such reasonable rules as now prevail in the city of Omaha.

Seventh. The said second party shall at all times keep said mains and hydrants supplied with water under a pressure of not less than ninety (90) pounds, for fire, domestic and manufacturing purposes.

Eighth. The price for hydrant rental to be paid by the first party shall be the same as that paid by the city of Omaha for additional hydrants; and in case of any reduction in hydrant rental in the city of Omaha, the same reduction shall be made to the first party.

Ninth. The prices to private consumers for water shall not exceed those charged at the same time, in the city of Omaha; that is to say, the charges for water at all times during the life of
499 this contract, shall be the same as charged in Omaha, and any concessions or reductions in prices in Omaha shall at the same time be accorded in East Omaha.

Tenth. In case of any purchase of the works of the second party in the city of Omaha by the said city, and the said property of the said first party shall not be included within the corporate limits of said city of Omaha, then and in such case the first party shall have the option to purchase the mains and pipes laid down within the said property; and if it does not choose to purchase the same the second party may convey the same to the city of Omaha, subject, however, to the provisions of this instrument. And in case neither is done the said second party shall in due season provide an adequate water supply through its mains and pipes at the same rates as hereinbefore provided for, without any break or intervention in such supply.

Eleventh. In case the said first party desires to purchase, under the circumstances mentioned above, and no price can be agreed upon, the fair cash value of the subject matter of the purchase, shall be left to the arbitrament and award of three disinterested persons, one to be appointed by each of the parties, and the third by the two so chosen.

Twelfth. All mains, pipes, valves and hydrants laid or put in by the second party shall be of first class material put in in a first class manner, and the pipes shall be of sufficient capacity [to] that

a pressure to the amount hereinbefore mentioned may be always maintained. No pipe upon which any hydrant shall be set shall be of less diameter than six inches.

Thirteenth. As a just consideration for the extending of the water franchise of East Omaha, as above herein set forth the said second party covenants and agrees that the said first party hereto, its authorized officers or agents, shall have the full right and authority to go upon certain lands owned by the second party in the city of Florence, Nebraska, described as follows; to-wit: Blocks 48, 49, 50, 51, 52, 61, 62, 63, 64, 65, 66, 74, 75, 76, 77, 78, and 79, Town of Florence, Douglas County, Nebraska, and take therefore the earth now thereon above a certain surveyed grade the profiles of which are a part of this contract.

The said material seven hundred thousand (700,000) cubic yards more or less, to be taken by the first party or its agents free of expense to the said first party, so far as remuneration for the material is concerned. The said first party or its authorized agents shall have the right to lay all necessary tracks on the said
500 land to make the proposed excavation, but in no case shall its agents be allowed to excavate below the established grades as per the profile attached hereto.

The said first party also agrees to lease sufficient material in the [embankment] each side of the pipe line crossing said lands, to admit of full protection from frosts or rains, and wide enough to admit of excavating at the top and safely getting to the pipe, dimensions to be thirty feet wide at the top and slopes one to one, but in case said second party desires and does lower said pipes to and sufficiently below the grades shown by profiles hereto attached, then, and in that case the first party has full right and authority to take the material remaining in the embankment.

Fourteenth. In addition to the above consideration, the said second party covenants and agrees with the first party, that the said first party or its agent shall have a right, so far as the said second party is concerned, to go over with trains or otherwise at all times during the duration or perpetuity of this main contract, the railroad tracks belonging to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, known as the "Old River Line."

Fifteenth. Also, the second party agrees that the first party, or its assigns, may have the full easement from the running of a single line of railway track upon and along the premises of the second party at Florence from a point on the Old River Line of railway, near the second party's pumping station at Florence, in a northerly direction, near the river according to a survey of such line which is hereto attached and made a part hereof. But in the exercise of such easement, no damage shall be done to any underlying pipe or apparatus; nor shall the second party be liable for any damage to such track, caused by the breaking of any apparatus or pipe upon the said premises. And the said second party shall retain at all times the right to pass underneath said track for the purpose of repairs, or laying down any new main, unobstructed by the first party, and shall not be liable to the first party for any damages

which may be caused to said track in the course of such work, reasonable care in replacing any disturbed materials being used and done by the second party. And the first party shall at all times keep the said track in good condition, so as not to disfigure the grounds of the second party, and it shall not be used as a highway, or a way of any kind, by anyone except the first party, its officers, servants and agents, in the transaction of the business of the first party.

And further, that this easement or right of way is not
501 salable by the party of the first part, except as it may pass with the land owned by the first party, hereinbefore described.

Said easement being for the purpose of allowing the first party to obtain earth and material for filling, from the premises to the north of the second party's station at Florence, and for any independent railroad line. The easement to terminate with the termination of this contract.

In Witness Whereof, the said companies have caused this instrument to be executed in duplicate, by their respective presidents and secretaries, and under their respective corporate seals, the day and year first above written.

EAST OMAHA LAND CO.
R. C. CUSHING, *President*.

ARTHUR S. POTTER, *Secretary*.

THE AMERICAN WATER WORKS
COMPANY.
W. A. UNDERWOOD, *President*.

N. H. HALL, *Secretary*.

End of Exhibit 12.

Complainants next offer in evidence a Resolution of Dundee, under date of September 7, 1889.

The same is marked Exhibit 13.

Mr. HALL: This is objected to as being incompetent and for the further reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 13, being the resolution last above referred to is as follows:
(See next page.)

Resolution of Dundee.

Resolved, that the right and privilege is hereby granted to The American Water Works Company, to lay water mains and pipes in the following named streets in that part of Douglas County called Dundee Place, viz: Platte street, Woodman avenue, Hoagland avenue, Nevada avenue, Dodge street, Capital avenue, Davenport street, Chi-

cago street, Cass street, California street, Underwood avenue, Webster street, Burt street, and Cuming street, to maintain the same therein and to enter upon the said streets for the purpose of laying, re-laying, repairing, and removing said mains and pipes, and doing all
502 kinds of work in connection with the mains and maintenance of water supply through the said street.

Provided, however, that the said American Water Works Company shall leave said streets in as good condition as before laying said pipes, and at its own expense shall promptly repair and fill up [and] washouts, excavations and other damage done to said streets by reason of laying said water pipes.

(Signed)

R. O'KEEFE.

Adopted September 7th, 1889.

This is a true copy of resolution passed as above.

A. J. WEBB,
Auditor of Board.

End of Exhibit 13.

Testimony of Edmund M. Fairfield, omitted.

Note by the Examiner: Although the witness George W. Craig was not examined until after the witnesses Isaac E. Congdon and J. E. Boyd, to-wit, on the 31 day of October, 1905, at 2 p. m., it was understood and agreed that his testimony as written out, should be placed in the record immediately following that of the witness E. M. Fairfield, for the reason that certain portions of the testimony of witnesses Congdon and Boyd more properly followed than preceded the testimony of the witness Craig.

Therefore the testimony of the witness Craig is placed immediately following this page.

GEORGE W. CRAIG, a witness on the part of the complainants, being called and duly sworn, testified as follows:

Direct examination.

By Mr. C. C. WRIGHT:

- Q. You may state your full name, Mr. Craig.
A. George W. Craig.
Q. Where do you live?
A. 5138 North Twenty-third street, Omaha, Nebraska.
Q. How long have you resided in Omaha?
A. Twenty-four years.
Q. What is your occupation?
A. Civil Engineer.
Q. How long have you been a civil engineer?
A. Since 1887.
Q. What, if any, official position do you occupy?
A. I occupy the position of Assistant City Engineer of the City of Omaha.

503 Q. How long have you been in that capacity, or employed in the City Engineer's office?

A. I have been employed in the City Engineer's office nineteen years. I have been assistant city engineer nearly six years.

Q. Does your business require you to become familiar with the pipes and distribution system of the Omaha Water Company as located in Omaha and surrounding municipalities?

A. I am in a general way. It is not a part of the duties of the office, except when called upon to look into such matters.

Q. Have you had occasion to investigate the distribution system and its extent and location, so that you are enabled to testify in regard thereto?

A. I have.

Q. Do you know what the relation is of the city of Omaha to the adjoining municipalities of South Omaha, Florence, and Dundee, and the section of country known as East Omaha?

A. I do.

Q. What is the area of the city of Omaha?

A. Twenty-four and one half square miles.

Q. And where, in relation to the city of Omaha, is South Omaha located?

A. Immediately to the south.

Q. And what is the area of South Omaha?

A. Approximately six and three-quarters square miles.

Q. Is there any intervening territory between Omaha and South Omaha?

A. None excepting a small portion adjacent to the river, which is known as Clontart precinct, or No-Man's-Land.

Q. Forms a sort of wedge upon the eastern line?

A. Lying east of 13th street

Q. Where, in relation to the city of Omaha, is the village of Dundee?

A. It adjoins the city of Omaha on the west.

Q. What is the area covered in that village?

A. About seven-eighths of a square mile.

Q. Does Dundee and South Omaha connect—do they come in contact?

A. No sir; they do not.

Q. Where in relation to the city of Omaha is the village of Florence?

A. It adjoins the city of Omaha on the north.

Q. Is it contiguous to the city, or not?

A. It is.

Q. Do you know what is the area of Florence?

A. Approximately two and two-tenth miles—square miles.

Q. And where is East Omaha in relation to Omaha?

A. It adjoins the city of Omaha on the east.

Q. And is that an incorporated village or not?

A. Not that I am aware of.

Q. And what is the area of what is known as East Omaha, approximately?

504 A. The territory of what is known as East Omaha precinct approximates about four square miles.

Q. East Omaha precinct—what is that? A voting precinct of the county?

A. I cannot say whether it is a voting precinct or not. It is a precinct known as such, or designated as such, by the county officials.

Q. Do you know about when the city of South Omaha was incorporated?

A. The city of South Omaha was incorporated October 16th, 1886.

Q. Do you know what the population of that city or town was in 1890?

A. I do.

Q. What was it?

A. Eight thousand and sixty-two.

Q. That is from the Federal census?

A. Yes sir.

Q. Do you know what the population was in 1900?

A. Twenty-six thousand and one.

Q. Do you know what the population has been in other years since that time?

A. In accordance with the bulletin issued by the Census Bureau, which is published annually giving the estimated population of cities that have a greater population than 25,000, it shows an estimated population in 1903 of 31,383.

Q. Have you any for 1904?

A. No sir; I have not.

Q. Do you know what is the character of the industries that are most prominent in South Omaha?

A. Yes sir.

Q. What are they?

A. Stockyards and the meat packing industries.

Q. They are located and situated in South Omaha?

A. They are.

Q. What meat packing industries are there? What companies are represented, if you know?

A. The National Packing Company, formerly known as Omaha Packing Company; Swift & Company; Cudahy's; Armour's and also the Hammond Packing Company; the latter, I believe, is not in operation at present.

Q. What is the fact, Mr. Craig, as to whether there are numerous railroad tracks and yards in South Omaha?

A. There are several tracks belonging to various companies located in South Omaha.

Q. Do you know about when the village of Florence was organized or incorporated?

A. No sir; I do not.

Q. Do you know about the population of the village of Florence?

A. It is designated by the Census Bureau as a village, and the census of 1900 showed 688. Florence precinct—

505 Q. I mean of the city of Florence. I don't care about Florence precinct.

Mr. HALL: Do you mean the population of the precinct is 688?

The WITNESS: No sir; that has reference to the city itself.

Q. Do you know when the village of Dundee was organized? If so, state.

A. The incorporation of the village of Dundee was authorized by the Board of County Commissioners December 8th, 1894.

Q. And what does it include?

A. The addition known as Dundee and Carthage, which lies immediately north.

Q. And about what is the population of Dundee?

A. The census of 1900 shows 400.

Q. And do you know anything about what the population is since that time—whether it is growing or not?

A. I know that the village is growing in population for this reason; I had a conversation with residents of Dundee who are interested in the matter of bonding the village for the purpose of constructing a sewer system, and the first question that came up was whether they had the requisite population to vote bonds. It was found necessary to have a population of 1,000 and they could only show something like 840 or 850 from a house-to-house count made by some of the officials.

Q. Now Mr. Craig, where, in relation to the City of Omaha are the pumping works of the Omaha Water Company?

A. The main or most important pumping works lie in Florence just immediately north of the city of Omaha.

Q. About what distance is the main pumping works from the north line of the City?

A. If my recollection serves me correctly, it is about eight or nine thousand feet.

Q. Are there any other pumping works of the Water Company?

A. There is a pumping plant located at the lower end of Izard street, on the river bank.

Mr. HALL: Burt.

The WITNESS: Or Burt street, I should say.

Q. Within the city of Omaha?

A. Yes sir.

Q. How many mains are there from the pumping works at Florence to the city of Omaha?

A. One.

506 Q. Can you tell about the number of miles of pipe and the weight of the same that are located within the city of Omaha, belonging to the Omaha Water Company?

Mr. HALL: Before you answer that I want to know whether you know that from your own knowledge, or whether you get it from some records.

The WITNESS: I get it from records.

Mr. HALL: I shall object to that as not the best evidence.

A. I do.

Q. What is the number of miles of pipe and the weight of the pipe in the city of Omaha belonging to the Omaha Water Company?

Mr. HALL: Now, I ask you what you expect to read from to give that. You are proposing to read that from some memorandum you have?

The WITNESS: Yes sir.

Mr. HALL: And that memorandum was obtained from these records, was it?

The WITNESS: Yes sir.

Mr. HALL: I object to that as not the best evidence, and as incompetent.

Q. (Read-:) What is the number of miles of pipe and the weight of the pipe in the city of Omaha, belonging to the Omaha Water Company?

A. In accordance with the records that we have in my office, this memorandum which I have being a copy of it, there are 182.29 miles of pipe—that is, up to December 1904.

Q. And that does not include any pipe laid since December, 1904?

A. No sir.

Q. And what is the weight of that pipe?

A. 39,445.86 tons, of two thousand pounds each.

Q. Do you know what is the extent of the distribution system of pipes of the Omaha Water Company in South Omaha?

A. I do.

Mr. HALL: Do you know in the same way that you do the others?

The WITNESS: Yes sir.

Mr. HALL: I object to it as not the best evidence, and as offering a witness whose knowledge is purely hearsay, and incompetent. The records themselves should be produced and brought here, subject to cross examination, and their verity should be ascertained and proved.

507 Q. What is the extent of the system in miles or feet, and the weight of the pipe?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except as far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity and prove it.

A. There were laid up to December—I should say October—1904, in the city of South Omaha 31.1 miles of pipe.

Q. And the weight?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity and prove it.

A. 7436.68 tons.

Q. Does this include pipe lines which are laid in the stock yards and to the packing houses?

A. It does.

Q. What is the length and the weight, if you know, belonging to the Omaha Water Company in the village of Dundee?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity and prove it. The witness has shown no absolute knowledge of anything concerning the matter at all.

A. There were laid up to October 1904, 2.57 miles of pipe.

Q. And the weight.

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity, and prove it. The witness has shown no absolute knowledge of anything concerning the matter at all.

A. 282.98 tons.

Q. What length of pipe and the weight of the same, of the Omaha Water Company is laid in the City of Florence?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity and prove it. The witness has shown no absolute knowledge of anything concerning the matter at all.

A. There were laid up to October 1904, 1.16 miles of pipe.

Q. Does that include the main line of pipe from the water works to the city of Omaha?

A. It does not.

Q. Have you included the mileage and weight of that pipe in any of the estimates you have given?

A. No sir, I have not.

Q. Do you know the mileage and weight of that?

A. No; I do not, without consulting my records that are in the office.

Q. Did you give the weight of the pipe in Florence?

A. No sir; I did not.

Q. What is that, please?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity, and prove it. The witness having shown no absolute knowledge of anything concerning the matter at all.

A. 102.89 tons.

Q. What is the weight and length of pipe in East Omaha?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from records which he has not produced; and that the proper method is to produce the records, show their verity, and prove it. The witness having shown no absolute knowledge of anything concerning the matter at all.

A. There were laid up to October 1904, 2.33 miles.

Q. And the weight?

Mr. HALL: We object to that as incompetent, in that it offers hearsay testimony, the witness admitting that he has no personal knowledge of it, except so far as he derives it from the records which he has not produced; and that the proper method is to produce the records, show their verity, and prove it. The witness having shown no absolute knowledge of anything concerning the matter at all.

A. 378.82 tons.

Q. Mr. Craig, do you know of any pipe laid belonging to the Omaha Water Company outside of that laid in the municipalities and places I have designated?

509 A. No I do not.

Q. Now, Mr. Craig, you have stated in reply to Mr. Hall that you took this statement from certain records. From what records did you derive your knowledge of the exact length and weight of these pipes?

A. From the various blue prints and schedules furnished the Board of Appraisal from time to time during the different sittings of the Board.

Q. Furnished by whom?

A. By the Omaha Water Company.

Q. Did you hear the testimony as to whether they were correct or not?

Mr. HALL: That is objected to as immaterial and irrelevant whether he heard that they were correct or not, and because this method of proving the weight in this manner is entirely improper and incompetent.

A. I did hear that they were.

Q. Did you hear testimony as to that?

Mr. HALL: That is objected to as immaterial and irrelevant whether he heard testimony that they were correct or not, and because the method of proving the weight in this manner is entirely improper and incompetent.

A. Yes sir, I did.

Q. Did you ever compare those maps and go over them with any officers of the Omaha Water Company or check them over to compare your figures and data made from them?

A. I couldn't say as to all of the data that I collected or went over, but I know that there were some of the schedules and draw-

ings that I did check over with the officers or employees of the Water Company.

Q. Did you have the possession of those plats and schedules which you have spoken of, the blue prints and schedules of which you have spoken for the purpose of determining and verifying the correctness of them?

A. Yes, sir I did have them.

Q. What has become of them now?

A. They were returned to the Omaha Water Company.

Q. At whose request or demand?

A. At the request of Mr. Hall.

Q. R. S. Hall, attorney for the Omaha Water Company?

A. Yes sir.

Q. And have you ever had them since?

A. No, sir, I have not.

Q. So far as you know, they are still in the possession of Mr. Hall or the Water Company?

A. Yes sir.

510 Q. What is the fact as to whether the figures and statements of the miles and weights of pipe that you have taken, are the miles and weights of pipe as shown by those blue prints or schedules to which you have testified?

A. They are the same. The weights that are used in the compilation of the total weights were the weights that were furnished by the Water Company in their schedules. The lengths of pipe were taken from the maps and profiles that were also furnished by the company.

Q. And when you speak of the Board of Appraisers you mean the Board of Appraisers which are appointed and are now considering the valuation of the Water Works under agreement between the City and the Water Company?

A. Yes sir.

Q. Composed of what persons is that Board?

A. I have forgotten Mr. Mead's initials——

Q. Daniel W?

A. Daniel W. Mead, John W. Alvord and George H. Benzenberg.

Q. Do you know whether the Board of Water Appraisers was furnished with a copy of these same blue prints and schedules to which you refer and from which you took your data?

Mr. HALL: That is objected to as immaterial and irrelevant and because this method of proving these matters in this manner is entirely improper and incompetent, also for the further reason that it is leading and suggestive, and because it is substituting for the documents themselves the opinions and guesses both of the Counsel and the witness.

A. Yes.

Q. What is the fact as to that?

A. The Water Company furnished duplicate sets of drawings and schedules. One set was used by the City and the other by the Board of Appraisers.

Q. Now what is the fact as to whether the blue prints and sched-

ules were single or numerous, whether there was one blue print and schedule, or whether there were numerous blue prints and schedules?

A. There were numerous blue prints and schedules.

Q. Is the statement of the length of pipe and weight an accurate and correct statement as shown by these blue prints and schedules which were presented by the Omaha Water Company as a correct statement of the length of pipe of the said Company and the weight of the pipe of said Company as submitted by the Company to the Board of Appraisers?

A. They are to the best of my knowledge.

Q. And did you make the computation to determine?

A. Yes sir, I did.

511 Q. Do you know the population of the City of Omaha, Mr. Craig, or did you investigate that?

A. I did not investigate that, I know——

Q. You may state what it is to the best of your knowledge.

A. I know that the census of 1900 gave the population of Omaha, as 102,000 and a fraction which I don't remember.

Q. Do you know the number of hydrants located and maintained by the Omaha Water Company in the several municipalities and vicinities to which I have referred in my prior questions?

A. I do.

Q. What is the number——

Mr. HALL: Do you know that in the same way that you do the other?

The WITNESS: Exactly.

Mr. HALL: From making compilations from records that are not here, and are not produced?

The WITNESS: Yes sir.

Mr. HALL: I object to the witness testifying about that as being entirely hearsay and without any knowledge on his part.

Q. You may state the number in the several municipalities that I have referred to?

Judge WOOLWORTH: In all of the municipalities did you say?

Q: You may state the number in each of those municipalities and precincts referred to in the testimony heretofore given.

A. Up to December 1904, the City of Omaha had 1529 hydrants; to October 1904, South Omaha had 314; to October 1904 East Omaha had 22; to October 1904, Florence had 13; to October 1904 Dundee had 6.

Q. During the sessions of the Board of Appraisers to which reference has been made do you know whether or not there was any agreement between the City and the Water Company as to the number and location of those hydrants?

Mr. HALL: The agreement that was made was in writing, wasn't it?

Mr. WRIGHT: I don't know whether it was or not, I want to find out.

A. I can't say positively as to whether there was an agreement

made covering the number of hydrants, but I am under the impression that there was, and also as to the length and weight of pipe.

Q. Were those various blue prints and schedules of the length and weight of pipe, and the number of hydrants offered
512 by the Omaha Water Company to the Board of Appraisers as a correct statement of the pipes and hydrants and the length and weight of pipes, if you know, that is, did the Water Company present them to the Board of Appraisers as a correct statement of the length and weight of pipes?

A. They were considered by us as being correct and where we had an opportunity——

Q. Well, I mean were they presented by the Water Company as correct, were they presented by them as a correct statement of their pipes?

A. They were, yes sir.

Cross-examination.

By Mr. R. S. HALL:

Q. The method, Mr. Craig, which was pursued in the Water Company's presentation of the schedules of property was that they would prepare schedules from time to time and submit them to the City so that the City might ascertain whether they were correct or not, wasn't that true?

A. Yes, I would say that was true. They were presented for us to check over.

Q. Then if the City had any doubt about the property represented by the schedule, they would call for the proof on it, wasn't that the way it was done?

A. Yes sir.

Q. Now, you had the checking over of the matters for the city together with others, didn't you?

A. Yes sir.

Q. You agreed with the Water Company as to the hydrants and as to the length and weight of pipe, did you not?

A. Yes sir. There were in one or two instances some minor matters about which there were questions in some cases, questions of computation and in others, it was an elimination of some items. The matter was brought to the attention of the representatives of the Water Company either during the meeting of the board or after the board meetings, and corrections were made and were agreed to.

Q. In some instances, you yourself made [mistaken] in computations?

A. Yes sir.

Q. Particularly one where you made a mistake of some 10,000 tons in weight, do you remember?

A. I know that there were several instances in which computations that were made hurriedly that were incorrect, both by the——

Q. So practically the whole amount of this was agreed on eventually between the Water Company and the City wasn't it?

A. Yes sir.

Q. You would not pretend to carry in your head just what those figures were?

A. No sir.

513 Q. The figures which you have in your book are copies of some figures which you have in your office, are they not?

A. Yes sir.

Q. And those figures are copies of the original figures furnished by the Water Company, as you think?

A. They are not copies of the original figures, they are compilations made from the figures furnished by the Water Company.

Q. So that between the original documents and what you have now, there are three sets of compilations are there, or three sets of figures?

A. No sir, there are two.

Q. You think there are two?

A. Yes sir.

Q. The method which was adopted in making these schedules was about as good a way as any to find out just what property the Water Works Company had, wasn't it, and as a rule you thought they were generally speaking correct when they came through their hands?

Mr. WRIGHT: That is objected to as not proper cross examination.

A. Why I can't say that the method in all cases was as good a method as might be.

Q. Well, speaking generally?

A. Generally, yes sir.

Q. Did I understand you to say that the Water Company made any separate estimate of the pipe in Omaha as distinct from South Omaha, or in South Omaha as distinct from Omaha?

A. No sir, you didn't understand me to say so.

Q. Then you have no such figures as you say you have which divides up Omaha and South Omaha?

A. Yes sir, we have.

Q. Prepared by the Water Company?

A. No sir.

Q. Well that is what I am getting at; then you are not enabled to say that you have any figures or compilations made by the Water Company in which these amounts are expressed?

A. No sir.

Q. That is true of all these separate municipalities where you have undertaken to figure them up?

A. Yes sir, excepting in the item of valves and hydrants. I am quite sure that you have schedules designating where they are located.

Q. Yes, but no separate estimate of them?

A. No sir.

Q. In what way did you make your estimate of the area of South Omaha?

A. From a map that is published by Muir & Gaylord, dated I think, 1892.

514 Q. From what source did you make your estimate of the area of Dundee?

A. From the records of the County Commissioners—or from the articles—or from the petition rather, asking permission to incorporate the village, and in this petition, it designated two additions, they wished to include in the village of Dundee.

Q. Are you just as positive that Dundee has only 7-8 of a square mile, as of anything else that you have testified to here, Mr. Craig?

A. I am positive so far as it applies to the incorporation. I did not go any further through the records to find whether at a later date any other additions had been added to it.

Q. What is the date of that incorporation that you looked at?

A. December 8, 1894, that was the date upon which the County Commissioners granted them authority.

Q. From what did you make your estimate of the number of square miles in Omaha?

A. The records on file in the office of the City Engineer.

Q. What records are those?

A. Among them might be said the map that was published by Muir & Gaylord and also several other maps that are on file in the office.

Q. What other maps?

A. The map that is made on a scale of 100 feet to the inch.

Q. What map is that?

A. It is a map that is considered the office record map. It is a map that has been made from time to time and is supposed to be kept up to date.

Q. Who made it?

A. The map?

Q. Yes?

A. It is very hard to answer that question. The map is a record that was started a great many years ago, and it merely shows the lands that are within the confines of the city, but as to who made it, different ones did.

Q. You personally don't know who did make it?

A. I know who made a part of it.

Q. But who made the original map?

A. If you have reference to the original map of the City of Omaha—

Q. No, I mean the original map there. You say I think that it hangs on the wall?

A. Well, the one that hangs on the wall, that was made by Rosewater and Chrisler, and was published by Muir and Gaylord.

Q. Well, did I understand you that you had some original
515 map that you made that from, one that was made in the City Engineer's office?

A. Yes sir.

Q. Well, who made that map?

A. I can only answer you as I have answered you before and that is, that it was made by different draughtsmen. The skeleton

of the map was made in sections and was filled in from time to time as the additions were laid out to the City of Omaha and as the city limits changed the additions to the map were made. They were made on a scale of 100 feet to the inch and represent a quarter of a square mile to each page of the plat.

Q. You don't know who made that at all?

A. I could name over half a dozen draughtsmen that had worked on it from time to time.

Q. Has that got all the later additions on it of Omaha—that map?

A. It has so far as I know, with possibly the exception of two or three additions that have been laid out within the last three or four months.

Q. Mr. Craig, you spoke of the two pumping plants here, belonging to the works, the Burt street plant, is the old—is the plant that was put in by the first Company at the time the works were accepted, was it not?

A. Yes sir.

Q. Amply sufficient for the use of the City, isn't it?

Mr. WRIGHT: We object to that as not proper cross examination.

A. You mean at the present day?

Q. Yes.

A. I would think not.

A. Why do you speak of the pumping plant at Florence as being the main pumping plant?

A. Because that plant pumps practically all the water that is now being used.

Q. How do you know that?

A. From the fact that I have at different times of late years visited the Burt street pumping plant and perhaps on a few occasions found the pumps standing still, and the other at Florence in operation, I think that is all.

Q. Well, the main pumps in the system might stand still mightn't they, without ceasing to be the main pumps? Is that the only reason you have for calling the pumps at Florence the main pumps, is the fact that the Burt street plant sometimes stands still?

A. No, I would say from the further fact that the Water Company moved their principal pump from the Burt street station to the Florence station.

Q. When was that, Mr. Craig?

516 A. Well, that was sometime after the establishing of the Florence station.

Q. Perhaps you can tell us the description of the pump which they moved from the Burt street station to the Florence plant?

A. It seems to me that it was the low pressure Gaskill pump. I know that there was one or the other of those pumps moved.

Q. Did you see it?

A. No sir, I did not.

Q. How do you know any such thing as that?

A. Only from hearsay.

Q. Who told you so?

A. I don't know as I can tell you. I don't seem to have the matter clear in my mind.

Q. Isn't it true that they didn't do that at all?

A. My information may be incorrect.

Q. Don't you know that the low pressure pump is not the main pump either in the Florence station or the Burt street station?

A. Yes sir.

Q. You spoke of moving the low pressure pump, don't you know that the low pressure pump is not the main pump in either plant?

A. I know that it is quite essential to the station.

Q. Well, it is not the main pump, is it, even assuming that it is true, so that it couldn't be so that you call that the main pumping station because of the moving of the main pump, is it? Have you any other reason for calling it the main pumping station?

A. No, unless I might refer you to the testimony of Captain Reynolds—

Q. I am speaking now of your own knowledge.

Mr. WRIGHT: Let the witness give his reasons for it, those are his reasons and he has a right to say if he has heard this man testify about it.

Q. I am asking him if he knows this of his own knowledge?

A. From the testimony of Captain Reynolds before the—

Q. I am asking you now, Mr. Craig, for facts within your own knowledge?

Mr. WRIGHT: I object to the propounding of the question until the witness shall have the opportunity of finishing his answer which Mr. Hall interrupted.

Mr. HALL: I am not asking for that and I don't care to hear it.

Q. Mr. Craig, I ask you now for your reasons within your
517 own knowledge respecting it, not what you heard from some one else?

A. I will give as my reasons the fact that I think—or that I know that the Florence station is the main pumping station, because in this station is located the principal pumps, both high pressure and low pressure that are now operated by this company in this system and in this city, and that the main that leads from [this] pumps is the largest main that leads from any of the pumping stations and further that the pumping plant which is located at the foot of Burt street is not operated regularly. I think that it all.

Q. As a matter of fact, within your knowledge, the Florence pumping plant is superior to the Burt street plant in every way, isn't it?

A. Yes sir, it is.

Q. That is the reason, really in your mind for calling it the main pumping station, isn't it?

A. That would be one of the reasons, yes sir.

Redirect examination.

By Mr. WRIGHT:

Q. Mr. Hall has directed your attention to errors and mistakes in computation. Let me ask you whether or not these errors and mistakes were corrected by consultation with the employees or officers of the water Company before the final computation which you have given in evidence?

A. They were.

Q. And Mr. Craig, in referring to the blue prints and schedules furnished by the Omaha Water Company from which you arrived at these divisions, what was there to indicate so that you might make the divisions according to the various municipalities, the pipe line I refer to now particularly?

A. There were maps, maps of plats, rather, that were furnished by the water company showing the mains and the sizes their location in each of these municipalities or villages that you refer to.

Q. Showing the length of pipe in each one?

Mr. HALL: That is objected to as leading and suggestive.

Q. State what is the fact as to whether or not from those various blue prints or plats, you could determine the length of pipe in each one of the several municipalities?

Mr. HALL: That is objected to as leading and suggestive.

A. You could, the maps or plats were copies of records showing the different additions and the dimensions of the lots and blocks and streets, and from them——

518 Q. And the size of the pipe?

A. Yes sir, the size of the pipe; and from them you could gather within very close limits the length of pipe?

A. Now, can you produce those blue prints and maps from which you made your computation?

A. No sir, I cannot.

Q. Why not?

A. They were returned to the Water Company at the time of the last sitting of the Board of Appraisal that was held in the City Hall.

Q. You have spoken about the Muir and Gaylord map of South Omaha, I think it was, wasn't it?

A. Yes sir.

Q. Do you know whether or not, and if so state what is the fact as to that being the recognized, correct map of South Omaha?

Mr. HALL: That is objected to as leading, suggestive and incompetent.

A. It is generally known as the recognized map, and in drawing legal documents it is quite often so stated. It is the last map that was published of the City of Omaha and I think of South Omaha.

Q. Now, the map which you have referred to as being in the office, made up of several sections, made on a scale of 100 feet to the

inch, I think you said, what is the fact as to whether or not that is recognized as the official map of the City of Omaha, if you know?

A. The map so far as the city authorities are concerned, is recognized as the official map.

Recross-examination.

By Mr. HALL:

Q. Who is it recognized by as the official map? In what way?

A. It is recognized by the legal department.

Q. The legal department of what?

A. The City of Omaha, and also the tax department. It is also recognized as such by the City Engineer's office in the preparation of plans of assessments and other legal documents.

Witness excused.

At this time by agreement of parties, the further taking of testimony in this matter, under the notice herein was adjourned until Wednesday, November 1st, 1905, at 5 o'clock P. M.

See note by Examiner, page 44.

ISAAC E. CONGDON, a witness on the part of the Complainants, being called and duly sworn, testified as follows:

519 Direct examination.

By JOHN L. WEBSTER, Esq.:

Q. Mr. Congdon, you may state your name, age and profession?

A. Isaac E. Congdon, 49 years of age; lawyer.

Q. What official position do you hold in the City of Omaha?

A. Member of the Omaha Water Board.

Q. Mr. Congdon, were you familiar with the inception of the proceedings by the City of Omaha to establish a water plant in this city, in the beginning, in the year 1880?

A. Yes; to a greater or less extent.

Q. At that time who was the city attorney?

A. Charles F. Manderson.

Q. And what was your affiliation with him at that date?

A. I went into his office as a law clerk and assistant in the summer of 1878, and the first of January, 1880, I associated with him as a partner in the practice of law.

Q. What year was that?

A. January first, 1880, and we remained together until May 1st, 1883. I was with him from January 1st, 1880, to May 1st, 1883, continuously.

Q. How familiar were you with the proceedings which led up to the drafting of the ordinance No. 423 and its adoption by the Mayor and Council of the City of Omaha?

Mr. HALL: We object to that as immaterial and irrelevant.

A. I was in the office every day and heard more or less of all the conversations that took place between the parties in interest, and

was familiar with General Manderson's investigations as City Attorney of Omaha of the water works problem and matters pertaining to it.

Q. At that time, who was the Mayor of the City of Omaha?

A. Champion S. Chase, I remember.

Q. And who succeeded Mr. Chase?

A. I do not now remember.

Q. Well, I don't know that I care about that.

A. Mr. Boyd, I think—James E. Boyd, I think.

Q. Who was the president of the City Council at the time when those proceedings were going on?

A. I think James E. Boyd. He was in the Council, I am certain of that, from the 6th Ward; he lived where he does now.

Q. Is that the same James E. Boyd who is at the present time a member of the Water Board?

A. Yes sir.

Q. During the preparation of Ordinance No. 423, and prior to and up to the time of the entering into of the contract between the city of Omaha and Sidney E. Locke for the construction of a water works plant, did you know of discussions going on between the parties in interest relating to the provisions of section 14 of Ordinance 423, relating to its scope and meaning.

Mr. HALL: We object to this as incompetent, irrelevant and immaterial.

A. Yes sir.

Q. At that time, and up to and including the time when the said contract was entered into, what was said between the respective parties, or the understanding of the parties, as to whether or not, if the city of Omaha should purchase, under the provisions of Section 14, whether there should or should not be included in such purchase as an item of valuation, what is commonly spoken of as going value?

Mr. HALL: That is objected to as incompetent, and not the best evidence, because whatever discussions were had were merged in the contract, and because the same is incompetent, irrelevant and immaterial.

A. Nothing was said as to going value at that time or at any other time. I have a very definite and fixed recollection of what the idea was between the parties, but I can't now definitely fix who the conversations—who engaged in those conversations; that is in reference to the names of men, but I well recollect—

Mr. HALL: I object to that further for the reason that the witness has already answered the question and said that nothing was said in reference to the matter concerning which he was interrogated.

Q. Well, I will get at it by another question.

Q. Do you mean by your former answer, when you said nothing was said about going value, that the phrase "going value" was not the words used in the talks?

Mr. HALL: We object to that as leading, suggestive and improper in view of the preceding answer.

A. Well, I will answer that and tell you what the facts were. No such words as "going value" were used. I will answer the question further in this way. There were talks had between the parties in interest on one side—I remember one man by the name of Flagler, especially, and there were other men here as well, and on the other side by Manderson, as city attorney, and James E. Boyd, were the two most active men representing the city. The water works matter came up first by the employment of Mr. Cook, as engineer, from Toledo, Ohio. He came here at the instance of the city and
521 made his investigation and report, which was filed with the city clerk, and appendix was also made by him and filed with the clerk, which was a sort of supplementary report. Then different ordinances of different cities were obtained by Manderson as city attorney, possibly by the engineering department, and conversations took place between Gov. Boyd and Gen. Manderson, representing the city, and these other parties who were here at various times, as to a system of water works, to be built upon the Cook plans and reports; and the ordinance which is 423 was finally drawn up by Gen. Manderson [which] such assistance as I could give him—I think you will find the original ordinance is in my handwriting as a copyist. The idea was that the party building the works—

Mr. HALL: Wait a minute. I object to the witness giving the "idea", or his own conclusion as to what the intentions of the parties were as being immaterial and incompetent, and giving conclusions instead of facts, and also improper in view of his preceding answers to the preceding questions.

A. The substance of the conversations was—I shall not attempt to recite the conversations—but the substance was that the works should be built under the ordinance by the parties who should undertake them, and that after twenty years the city should have the right to buy the works at a valuation to be fixed by three experts, engineers, and that the city should pay for the works, but should not pay anything for the unexpired franchise. The talk was between the parties as to water works and the franchise, and that Section 14 was drawn with that in mind.

Mr. HALL: I now move to strike out the foregoing answer as being incompetent, and also as not responsive and also as improper in view of the answer to the preceding questions.

Q. Mr. Congdon, what was it that was to be paid for?

Mr. HALL: That is objected to as incompetent, because it is endeavoring to substitute the witness's conclusion for a written contract; because it is vague, indefinite and not competent either between parties or strangers to change the terms of a written contract by a witness's conclusions.

A. For the water works; that is the physical water works. I wish to add further that I do not mean to say that the [works] "physical

water works" were used; but I know that it was the intention of the parties, at least the parties on the city side, that at the end of the twenty years, or whenever the city elected to buy after the twenty years, they were to buy the physical water works, and were to pay nothing for the unexpired franchise.

522 Mr. HALL: I object to so much of that answer as says the witness knows what the intentions of the parties were, and so far as the same differs from the written contract and undertakes to impeach it or change it; and move to strike it out.

Q. What was then said between the parties, or the substance of such conversations, if such there were, on the point as to whether or not the price fixed for the hydrant rental would furnish sufficient compensation for the capital invested in the construction of the plant?

Mr. HALL: That is objected to as incompetent, irrelevant and immaterial, and as undertaking by the conclusion of an interested witness to change a written contract, and because the same is thoroughly incompetent in any view of the case, and because the same is improper in view of the preceding answers of the witness, showing that he has no specific knowledge of any such talk.

A. I can't tell you with whom any conversations were had on the subject, as I can't name specifically the men that the conversations were had with, more than Gov. Boyd and Gen. Manderson as representing the city. Possibly some of the members of the Council and some of those other parties, but I can tell you my recollection as to the idea expressed at the time, as to what the deal was to be, if you wish.

Q. I wish it.

Mr. HALL: That is objected to for the reason that the ideas of the witness as to what the deal was to be, or the ideas of any person as to what the deal was to be would be incompetent and not the best evidence, and would be offering conclusions to impeach and change a written contract.

A. As I have said before, I distinctly remember this Mr. Flagler; he may or may [now] have been a member of some people who were here representing the Holly Water Works Company, or whatever it may have been named, who were a concern engaged in constructing pumping engines and water works systems. Before the ordinances were drawn conferences were had in Manderson's office with reference to how the works should be built and suggestions were made by those other parties, and also by the parties representing the city, and the plan involved was this: That works should be built from all the plans and specifications prepared by Cook that the parties should come here and invest their money for the works, and the operation of them for a period of at least twenty years, and possibly longer, and should furnish water for fire hydrant purposes for a fixed
523 time, and it was finally fixed that that should run for twenty-five years, but should be cut off in the event that the twenty years expired within the twenty-five and the city elected to buy

under that provision which gave the city the privilege to buy after twenty years, and that the income from the hydrant rental, and what should be obtained for domestic and mechanical purposes from the inhabitants of the city at large would represent the total income that the party building the works would have upon their investment for a certain time. That was the line of the talk that was had between the parties.

Mr. HALL: We now move to strike this answer out, for the reason that the ideas of the witness as to what the deal was to be, or the ideas of any other person as to what the deal was to be would be incompetent and not the best evidence, and for the reason that it is offering conclusions to impeach and change a written contract.

Q. Now I want to get, if I can a little more specifically expressed, whether in the event the city elected to purchase, that the money which the water company would receive for hydrant rental and for domestic service, coupled with the pay for the physical property, would represent the entire consideration which the water company was to receive as an inducement for the building and maintenance of the water plant.

Mr. HALL: That is objected to as incompetent, as undertaking to substitute for the contract the conclusions of this witness, and also attempting to substitute for the opinion of a court the opinion of this witness, and also because the question is leading and suggestive; the question has already been answered and because the same is incompetent and irrelevant.

A. That, in a nut-shell was the idea; that is, the city was not ready to build the works itself and these parties should come in here and construct these works, according to these plans and constructions, and for the benefits as set forth in the ordinance and the contract.

Q. Mr. Congdon, at that time, were the terms of that ordinance and its scope and meaning a frequent matter of consultation or discussion in the city attorney's office and between him and other city officials and representatives of water companies, or persons contemplating making bids under ordinance 423?

Mr. HALL: That is objected to as leading and suggestive and because the witness has shown in his previous answers that no such thing occurred as indicated by that question.

A. Yes sir.

524 Q. When did you first ever hear that in the event of such a purchase by the city there was to be added to the value of the physical plant any other sum of money representing what is now called going value?

A. I can't answer that definitely as to dates, but as I now remember it, it was sometime during the course of the hearings before these three engineers that I first got the idea that there was to be a claim for going value—these three appraisers.

Q. Well, did you ever hear of going value being mentioned as an element in valuation prior to the appointment of Mr. Mead and Mr.

Benzenberg and Mr. Alvord, as to appraisers to appraise the property?

A. No sir.

Q. And that occurred in the year 1903?

A. Yes sir.

Q. And who was it, as far as you recall that first made to you the suggestion that "going value" was an element to be considered; I mean, what interest was it that made that suggestion; I do not care as to the individual?

A. I can't tell you who it was, and I have no definite recollection when it was, but it was during some meeting of these three engineers—that Board of Appraisers. It may have been in some of the opening statements of counsel to the board, but I have no definite recollection as to that.

Q. Well, what I wanted to get at, if you can recollect, whether the thought that you was to pay for going value was suggested by somebody in the interests of the water company, or was it suggested by somebody in the interest of the city of Omaha?

A. Well, I can't say; I have no distinct recollection as to that.

Q. Well, what was the position of the city of Omaha and the water board on that question when it was first brought before the Board of Appraisers or engineers?

Mr. HALL: That is objected to as immaterial, irrelevant and incompetent. It makes no difference what their position was. The question is what the contract provided.

A. The position was the city ought not to pay for going value.

Q. And what is the fact as to whether the city and the water board have or have not still adhered to that notion?

Mr. HALL: That is objected to as immaterial, irrelevant and incompetent. It makes no difference whether they adhered to that notion or not, the question is what the contract provided.

A. That is still the position of the water board.

Q. Mr. Congdon, going back again for a moment to the
525 year 1880, are you able to state about what was the population of the city of Omaha in that year?

A. My recollection is it was about thirty thousand; I can't give you the exact figures, but about 30,000 people as I remember; I think the national census gave us something over 30,000 and the state census of 1885 some sixty odd thousand.

Q. And the population today is about what?

A. Well that is a matter of guess largely. I think the census of 1900, as I recollect it, gave us a population of something over 102,000. Beyond that I have no definite information. I would say 125,000 would be my personal estimate.

Q. Of the population today?

A. Of Omaha, today.

Q. In 1880, was the city of Omaha then comparatively a new city?

A. It was, so far as any water works system was concerned. It had no system of water works. It was a city in a much more crude

condition than it is today, and in the sense you mean it was comparatively new, compared with other towns in 1880.

Q. And was it, or was it not, regarded as one of the cities on the Missouri River that would rapidly grow and develop during the years thereafter to come?

A. Yes sir; it was.

Q. And what was the then prevailing idea as to whether the investment in the water works plant would be a profitable investment to the builders.

Mr. HALL: That is objected to as incompetent, irrelevant and immaterial, as to what the idea was.

Q. I want to add a little more to it, so you will get my meaning, you don't know what I am at, I guess—that is to say, whether or not it was then the belief that the city would continue to grow in population, and the number of consumers of water would increase from year to year so the revenues of the company would grow in proportion as the city would grow, from year to year?

Mr. HALL: That is objected to as incompetent, irrelevant and immaterial as to what the idea was.

A. Well, it was the idea, I suppose you call it the prevailing idea, that the city would grow, as it is the prevailing idea that it will grow today, from this on; and I would say further this, that at the time, during these talks, the idea of the growth of the town was talked over by the various parties there.

Q. Is so, then what was the consensus of their opinions or judgment as to whether the hydrant rental and the revenues from private consumers would be ample compensation for capital invested in the construction of the plant?

Mr. HALL: That is objected to as being [*immaterial,*] irrelevant and immaterial, what the consensus of opinion was about that.

A. Well those talks were preliminary as to the scheme and the manner in which the city should acquire—that is, pass the ordinances to get the water works, and the other parties to come in and take hold and invest their money: In the talk as to the period of 20 years, how long they should have it, there was talk as to making it a longer or shorter time, fixing the period at which the city could take it, and talks probably similar to those you have in mind came up with reference to the development of the town, and what there would be here, and so forth in the course of time, and finally it was arbitrarily fixed upon, one period was fixed at 20 years, and the fire hydrant contract at 25 years.

Q. Now, were those periods of time fixed upon as a result of these consultations as a time when the pay for the physical plant without any pay for the unexpired term of the franchise would be fair as between the city and the water company in the event that the city elected to purchase?

Mr. HALL: That is objected to as leading and suggestive, because it assumes a condition of things not proven by the witness's answers

heretofore, and because the same is incompetent and undertakes to impeach and change a written contract, and is irrelevant.

A. Answering generally, I would say this: No; I don't want it understood that the [*works*] "physical value" were ever used—that is at the time. We were talking water works and discussing the best means of getting a system of water works for Omaha, and suggestions came from those various men how they would take hold of it, and ordinances of other cities were looked into, and those various things considered. It was all a new project, and it got down to this finally, that all these different matters you have inquired about were talked over generally—the growth and development of the town, and period fixed at 20 years was a sort of arbitrary time fixed as a matter of compromise between the different opinions as to the length of time, and the period of 25 years was fixed in that way, and when I say I well know what the idea was, I mean to say this, that it is positively in my mind from the whole general talk there, as to what the idea was,

527 yet if you asked me to express that idea, in their language, I couldn't tell you at this date. They were talking about buying the water works at the end of 20 years, and Manderson wound up that section and said "Further provided" some such words as this, "Nothing shall be paid for the unexpired franchise;" because I know well what the idea was that these parties should come in and build these works and have them certain for themselves for these twenty years, and after that we could buy them any time, and the contract should go for twenty-five years, unless cut off between the period of 20 and 25. If it was not at the end of twenty five years, we could make a new contract as to hydrant rental, and we might not buy the water works for thirty years, but when we bought the water works we would buy the water works. Now, there was no such words as "going value"—don't think it was thought of then by anybody, and I know well what was in Manderson's mind, and what was in Boyd's mind, and I think the same thing was in the other parties' minds; that is they were to buy the physical water works but no such expression as "physical water works" was used, that is what I mean.

Q. In those talks, and at that time, was there anything said by any of the parties, that in the event the city of Omaha should elect to purchase, that it was to pay the water company any consideration for any matter whatsoever in the way of compensation for their time or labor, or anything for the development of the plant, or any other item that might be included, vaguely or definitely within the phrase "going value."

Mr. HALL: That is objected to because it is undertaking to have the witness substitute his opinion for the opinion of the court on the contract that was made between the parties, and further, because the question is leading and suggestive to a witness who is perfectly competent to answer the question without being led to it and further because the witness's answers have fully covered that ground now, and the question as put to him is an attempt to have him vary the answers already given.

A. If I understand that question, I will answer it no.

Q. Mr. Congdon were you present at the time when the Board of Appraisers, Mr. Meade, Mr. Benzenberg and Mr. Alvord organized?

A. I think so, yes sir.

Q. You at that time were a member of the Water Board?

A. Yes sir.

Q. At that time, or prior to that time, what was said or was the understanding as to the period of time within which these appraisers were expected or supposed to finish their work of appraisal?

528 Mr. HALL: Objected to as immaterial and irrelevant.

A. Well, whatever was said prior to that time, as far as I know was said between members of the board on the subject with reference to certain information that we had received from various engineers as to the time it would take in which to complete the appraisement.

Q. And from that then, what was your understanding as to the necessary time?

A. Why that it would take from thirty days to six weeks at the longest.

Q. Well, how did it come about that the appraisement was not completed within that time—you may proceed and state in a little detail, Mr. Congdon, without my repeating the question.

Mr. HALL: Objected to as incompetent, irrelevant and immaterial.

A. I cannot now give you the date of the first meeting of these three engineers in Omaha when they took up the first subject.

Q. July 20th, 1903?

A. It was some time during the summer of 1903, I remember. They met in the room of the water board in the city hall and Mr. Wright, the city attorney, who represented the city [attorney]—the matter at that time being wholly in the hands of the city council under the law. There were various members of the water board there—Governor Boyd and myself, and possibly some others on the other side. I think both Mr. Woolworth and Mr. Hall were there; I wouldn't be positive of that, but I think they both were there, and the matter came up as to procedure, and my recollection is that both sides made preliminary statements, and the question came up as to an inventory. It appeared that the water company had no regular inventory, and either at that meeting or some subsequent meeting; I wouldn't pretend to say what meeting it was; there was some talk about the appraisers appointing some particular man to make this inventory, and the water works counsel stated that they wished to make that inventory themselves. I think that Mr. Woodbury was there at the first meeting, first or second, and finally it was determined by the Water Board, Mr. Mead acting as Chairman, that the water company should go on and make the inventory. Then, an adjournment was taken and another meeting was had, but the inventory was not completed; the water company claiming they had been unable to get the proper man to make the inventory, that they had made efforts to get one man and another; I think some man by the name of Cole was mentioned. They

couldn't get him. It first appeared that the appraisers wanted a man named Burdick, who had done similar work under other appraisements, but he was in some manner associated with Mr. Alvord, and they concluded not to have him, and the water company through unavoidable or some sort of delay were not ready for the meeting, and considerable time was exhausted in that manner, and the appraisers would meet and certain evidence would be introduced, and innumerable blue-prints were put in. The whole proceedings took the form as of a proceeding in court. I don't remember whether the witnesses were sworn or not, and there was a stenographic report of the proceedings made, and matters drifted along that way; the water company being delayed in the getting of the inventory, or claimed they were delayed, and so the matter drifted along. I know that the water board felt that the matter was being unnecessarily delayed; that there could be more expeditious action, and at one time Mr. Woodbury took occasion to state that the Water Company had been accused of purposely delaying the proceedings, and he wished to deny it, and a little unpleasantness took place between him and Governor Boyd, which was passed away in a moment or two. Proceedings went on in that way until a period of 18 months, I think it was, before they finally got through and submitted the case. During this time the water board had no power to interfere with the appraisement, but there was a desire on the part of Mr. Wright, acting as city attorney, that the appraisement be brought in separately as to the different municipalities; that is, the appraisement when returned by the engineers should show a value as to Omaha, South Omaha, Dundee and Florence, separately, and I believe he was also willing that there should be one gross appraisement of the whole; while the water company insisted that there should be one gross appraisement only of the whole property, and on the final argument the desires in that respect by counsel on opposite sides were very clear and distinct, Mr. Wright taking the position that the appraisers should bring in separate appraisements and the water company that they should bring in a gross appraisement; and Mr. Woolworth himself argued that phase of it to the water board in the end. I think it was along in January, as I recollect, of this present year—no; probably before that, that the water company got this testimony in, and then they met for the last time, as I recollect, in January, to get the City's case and the City's case
530 went in very promptly, and an adjournment then took place, and they were at work for a period of about fifteen to eighteen months.

Q. From July 20th, 1903, to January 1905, had there ever been any postponement or delay at the instance of the city of Omaha, or at the instance of the City Water Board?

A. Not that I know of, sir.

Q. And what are the facts as to whether these respective delays and adjournments were at the suggestion of the representatives of the Omaha Water Company?

A. As a rule they were especially during the first two thirds of it, you may say. Possibly they may have been ready to go on at some time, and the appraisers may have delayed the time until

they could meet for a little while; but the delay was occasioned chiefly through the fact that the water company were not ready with their inventory.

Q. Well, why didn't the water company have its inventory prepared?

A. I don't know sir.

Q. How?

A. Why didn't they have it prepared?

Q. Yes.

A. I don't know; they claimed they had no inventory, and that it was necessary to make an inventory, and when it was suggested again—I can't tell you by whom it was suggested, but by Mr. Wright or some of the appraisers—that we take [an] agree upon some man to make the inventory named by the Board, why counsel for the water company stated that they preferred to make their own inventory, and make their showing their own way, and the appraisers acquiesced in it. They took this form, Mr. Webster, of making maps and schedules and blue-prints of the various parts of the works, and then supplementing those with oral testimony, rather than by the engineer's making personal examinations, although the engineers did on possibly two or three occasions make examinations. I didn't go with them, but I understood they went to Florence once or twice and looked at the riprap work there and then rode across the river and looked at some riprap there, and then went to South Omaha, I remember on one occasion; but they took it upon themselves to sit almost wholly as a Court, instead of taking hold of the matter and making their investigations personally.

Q. Did you perceive any occasion for the preparation or presentation to the engineers of these various maps, diagrams, schedules and so forth, which were prepared and presented by the water company?

A. Personally, I did not, to the extent that they were presented.

Q. Do you know about how many such maps and exhibits they prepared and presented to the engineers during that period of 18 months?

A. No; I do not, as a matter of personal estimate, there was a vast number of them, though.

Q. Well, in a general way, do you know what they included?

A. Well, I did not attend every meeting, but I attended several of them at times. I remember one set of blue-prints, I think they were where the showing was made as to street car and railroad crossings, and another as to hydrants, and then the detail work in South Omaha in the stock yards and around the packing houses, and then maps of the riprapping and the river and so on were put in, but what seemed to me particularly unnecessary was the introduction and examination of all the blue prints with reference to street car crossings, because that was something—the situation with regard to the street car crossings could have been investigated in a very short time, I thought, by these appraisers themselves.

Q. Well, independent of the riprapping, wasn't everything else

subject to personal inspection by the engineers, if they had gone over the city?

A. Well, yes, I suppose so; that is everything on the surface of course.

Q. Well, the maps would show the length and size of the water mains, wouldn't they?

A. I suppose so, yes sir.

Q. The fire hydrants were all alike, were they not?

A. I don't know about that; there may have been two or three different models; I think there were.

Q. Well, they are substantially the same thing, are they not, fire hydrants?

A. I think so.

Q. Now there is a matter I want, which you may not be able to tell for a moment; if not you can qualify yourself, but I want to know the amount of compensation these engineers are receiving, and the amount of time they have given up to this work, so as to get at the expense the city has been to by these engineers in this appraisement so as to form some opinion as to what the ultimate expense may be, if they are permitted to go on in the manner in which they are going on?

A. My recollection is that our agreement with Mr. Alvord was that we were to pay him fifty dollars a day for the first ten days and thirty-five dollars a day thereafter, and the opinion was that the appraisement would not continue over thirty days to six weeks; and we were to pay also half—I don't know as there was any writing at all about that, but I think it was a stipulation before the appraisers, and my recollection is that we were to pay half of
532 the expense of the third appraiser—in other words, the water works was to pay their appraiser, and we were to pay ours, and the two of us were to bear the expense of the third. What the expense was, I don't know, although we have passed bills allowing Mr. Mead a certain amount of money. Now what we have paid I can't tell you from memory exactly, but it has run into three thousand dollars or more than that; I know we have paid—

Q. Well, you can have that furnished you, so you can state it in exact figures when we meet again.

A. We have paid Mr. Alvord and we have paid Mr. Mead also.

Mr. HALL: You are going to bring that information in?

The WITNESS: Yes, I will bring it in, if you want me to.

Mr. HALL: I understand that Mr. Webster has asked you to.

Mr. WEBSTER: Yes; just get that and present it here the next time we meet.

The WITNESS: I presume the best way would be to get those vouchers right from the Comptroller's office.

Mr. WEBSTER: All I want to know is the amount.

Q. Now, I am going to put another question that I know you can't answer now, but I want you to think of it. I want you to find out about what proportionate part of the time of these engineers has been taken up with this South Omaha business, with Dundee

and Florence and the rick-rapping and all that, so as to get about what proportion of this expense money that the city has paid out relates to this outside property that we have no concern in?

A. What do you mean by that, "the proportion of time before the appraisers on these different subjects?"

Q. Yes, in some ways?

A. Well, I don't know as I could ever qualify to answer that.

Q. Well as best you can?

A. Mr. Wright can tell you that; he was there most all the while, and Gov. Boyd was there all the while, but I don't think I would ever be qualified to answer that because I wasn't there all the time, although I think I was there a part of the time at every meeting.

Q. Well when the time comes, if you cannot in any way, we can dispose of it by saying that you can't answer it?

At this time an adjournment was taken until 2:00 P. M. this afternoon, to-wit, October 30th, 1905.

533 All parties met pursuant to adjournment at 2:00 P. M. and the examination of the witness Congdon was continued as follows by Mr. Webster:

Q. Mr. Congdon, I will ask you a few more questions. Mr. Congdon, have you seen the affidavit filed in this case—the affidavit of Mr. Theodore C. Woodbury, filed in this case, dated the 12th day of October, 1905?

A. I have not seen the original affidavit, unless that be it, but I read what purported to be a copy of his affidavit in the Omaha Bee, and I have glanced at this document, but I have not read the whole of the document with care. I read what purported to be Mr. Woodbury's affidavit filed in this case in The Bee. I examined that which you hand me, which seems to be a certified copy.

Q. I call your attention to a statement on Page 6 of said affidavit, to the point that Mr. Woodbury is "informed and believes that it was the understanding and purpose of the members of the water board in nominating an appraiser to purchase the entire water works, without as well as that within, the city limits." You may state whether or no such was the understanding and purpose of the water board?

Mr. HALL: That is objected to as an endeavor to make testimony after the fact, and an endeavor to impeach the record of what they did; which is shown by their resolution and proceedings, and it is from that alone that the action of the board can be determined; not from the statement of any individual member of it.

A. There was no purpose expressed in the Board whatever in the appointing of the appraiser. The first thing for the Board to do was to name an engineer, and the board named Mr. John B. Alvord as engineer, but so far as taking up and discussing as to what he was to do, why there was nothing of that kind that I have any recollection of; that is, there was nothing said as to the purpose. What was

done was to appoint an engineer to act in the appraisalment as the city's appraiser.

Q. I call attention to the statement on page 10 of said affidavit wherein Mr. Woodbury states in substance that the water board proposed to prevent or delay the completion of the appraisalment by the commencement and prosecution of the suit in which this evidence is being taken. You may state what the fact is as to whether the water board had any such purpose or intent in the bringing of this injunction suit?

A. (Looking at the affidavit referred to.) Where on page 10 is the matter to which you refer, commencing with the words "It was not until" and so on (reading from the affidavit). The object of the water board in bringing this suit was to have a determination by a competent court as to the matters involved in this appraisalment; the legal matters, as to whether or not this city had the power to acquire water works outside of the territorial domains of the city, as to whether or not going value could be taken into consideration, and various other matters that seemed to be legal questions, and in the judgment of the Board was causing the delay in the return of the appraisalment, so far as any purpose in the bringing of the suit to prevent the appraisalment altogether and to undertake to acquire the plant by condemnation as suggested by Mr. Woodbury, that was never in the mind of the water board, so far as I ever heard at all. As a matter of fact, my own personal judgment was that the city never had any power to condemn this plant, and I often expressed myself in that way, feeling that this mode was the best way for the city to acquire it.

Q. I call your attention to another statement in the affidavit of Mr. Woodbury, in a paragraph on page 11 of the certified copy, which paragraph reads as follows: "I have also no hesitation in saying that I fully believe that the suit in which this affidavit is made was brought for the purpose, not only of delaying the appraisalment, but of preventing an appraisalment if possible, and defeating the purchase of the water works plant of the Omaha Water Company, under the provisions of Ordinance 423." State what you know as to whether or not that statement of Mr. Woodbury is true or not true?

A. Of course, I know nothing about his opinion, but as I said before, the suit was brought for the purpose of having these legal questions determined before any more time or money was spent in an effort to arrive at an appraisalment, but I am speaking for myself as a member of the Board, and I think for every member of the board, when I say that it was not brought for any purpose of defeating the appraisalment under Ordinance 423, but was brought for the purpose of aiding what we thought would be an effective appraisalment, so as to have these questions determined, in advance of any return; we felt that the delay was so long and the situation was such that we were not to get any definite appraisalment at all, unless the appraisers were to know what they were to do. And I want to say definitely that I never have heard anything said in the Board or elsewhere about condemning the plant; that has not been the idea

of the board; whether the individual members ever had it, I don't know.

Cross-examination.

By Mr. R. S. HALL:

535 Q. Mr. Webster called your attention to page 10 of the certified copy of Mr. Woodbury's affidavit where Mr. Woodbury stated that it was his belief that the water board proposed to prevent and delay the progress of the appraisement, and as I understand you, you deny that that was the purpose of this suit?

A. To delay and prevent?

Q. Yes sir.

A. Well, in one sense the purpose is to delay, in that it is so desired to have these legal questions determined in advance of the appraisement, but there was no purpose of preventing an appraisement.

Q. Then you knew, of course, that the course that you intended to pursue would delay the appraisement until the suit was finished?

A. Personally I wanted the whole thing stopped.

Q. Now, I don't wish to quarrel with you about this, but I would want you to answer the questions, and not wander off into something else.

A. Well, put your question: I intend to answer your questions fairly and fully. What is your question?

Q. (Read) Then you knew, of course, that the course which you intended to pursue would delay the appraisement until the suit was finished?

A. It would delay any further work by the appraisers, but whether or not it would delay permanently the appraisement or expedite the appraisement is a question. I think it may expedite an appraisement.

Q. You knew, however, that the immediate result would be to delay the appraisement until the suit was terminated?

A. Yes sir.

Q. Were you in consultation with Mr. Webster and Mr. Wright in preparing the petition or the bill in this case?

A. No, not until after the bill was prepared, practically was not in consultation.

Q. Did you go over it with them?

A. I heard it read, yes sir.

Q. Did you approve of it?

A. I think so, yes sir.

Q. You approved the extent of the injunction which was asked for in the bill then?

A. I think I did, yes sir; I heard it read once, and I had a talk with Wright about it, and with Webster about it.

Q. Now, when was the bringing of this suit determined upon in the water board?

A. I can't give you that date.

Q. Well, as near as you can.

A. Well, it was—well, it would be a mere guess, but I will say this, as soon as the Board got power under the last amendment to the law

which created it, I took up the agitation of the bringing of this suit and it was discussed at various times, but just when it was
536 determined to bring the suit, I can't think, by dates. It wasn't done by any resolution of the board, Mr. Hall at all, but it was with the concurrence I think of every member of the board, at a meeting when the members of the board were present.

Q. Where was the meeting held?

A. It was held in the room of the board in the city hall, but it was not one of the regular meetings of the board.

Q. Then this action was substantially determined upon without making any record of it?

A. I don't think there is any record of it aside from the employment of counsel.

Q. Is that a common course?

A. No, but it was done in this matter, because we wanted to commence the action, and wanted to be sure that it was commenced, and that we had jurisdiction over the appraisers.

Q. Was it at that meeting that Mr. Wright was sent to Chicago?

A. I don't know whether it was that meeting or some other meeting.

Q. What is your best recollection?

A. I don't know whether it was at the meeting that that suit was determined on, or whether it was some other meeting; I have no recollection about that.

Q. You have no recollection about that?

A. I do know, but I can't state positively; it was determined by the members of the board that this suit would be brought in the matter.

Q. Perhaps you haven't heard the question which I put to you; what I asked you was whether it was at the meeting at which the suit was determined upon that it was agreed that Mr. Wright should go to Chicago, the meeting that Gov. Boyd speaks about when it was agreed that Mr. Wright should go to Chicago.

A. I don't think it was ever agreed at any meeting of the Board that Mr. Wright should go to Chicago, but the idea of the board was that the next time the appraisers were here that the suit should be commenced; I don't think there was anything expressed to the effect that Mr. Wright should go to Chicago.

Q. I don't wish to have any controversy as to whether this was a formal meeting or not, but at this informal meeting of which no record was made, was it at that meeting, whether it was a board meeting, or a meeting of the members of the board, or what not, I don't care anything about that; but was it at that meeting agreed that Mr. Wright should go to Chicago?

A. No; I don't think it was ever agreed that Mr. Wright should go to Chicago.

537 Q. Was there any understanding that Mr. Wright should go to Chicago, and induce the members of the Board of Appraisers to come over here?

A. I don't think there was Mr. Hall, with the whole board, in regard to that matter, no.

Q. Well, with as many of the board as were there?

A. No; I don't remember that anything was said about Mr. Wright going to Chicago.

Q. What was the understanding?

A. The understanding was that the next time the Board were here, action should be commenced.

Q. Did Mr. Wright say that he would get over here?

A. I don't remember that he did.

Q. Did he say substantially that?

A. Oh, it may have been that he substantially said that.

Q. At what meeting was that?

A. When I say "meeting" I am not making any assertions as to these being regular meetings of the board. It was understood—the matter was this way—so that there may be no equivocation about it—it was understood that the first time the appraisers were here that we would commence this suit, and try to get them before a court, and ascertain what the situation was.

Q. Now to go back to your judgment. As I understand you, it was your purpose, speaking of yourself now, individually, to have this suit brought at the very time that you got the authority that was given by the last legislature?

A. Yes; personally, I was opposed to the appraisement long before, and we talked the matter over with Mr. Wright and Mr. Mahoney, and so far as I know, I was the first man that found fault with the course of the appraisement.

Q. When you were down before the Legislature to get the law passed, you had that in mind?

A. Yes sir.

Q. You meant to bring this suit at that time didn't you?

A. No sir because the other members of the Board had not agreed with me, neither had Wright.

Q. No I mean as far as you were personally concerned?

A. As far as I was personally concerned I thought that this suit would have to be commenced. That was my judgment.

Q. You stated in your answer to Mr. Webster all the purposes that you intended to secure by the bringing of this suit didn't you, Mr. Congdon?

A. Possibly not. I will tell you again, if you wish it.

Q. No, have you stated everything to me? I understood you to say that those were the sole purposes.

A. I did, all that I had in my mind at that time. There
538 may have been others that were suggested by your questions.

The whole idea was to get this Board of Appraisers under the supervision of a court where we could have these questions determined in advance of any appraisement and to bring about an appraisement, because it looked to me as though it would wind up with a gross appraisement which, in my view, would be no appraisement at all, and they would wrangle and jangle and spend time and money and get nothing in the end and I felt if we had them in Court and got these matters determined in advance of any final conclusion, whether it was in detail on separate towns or in gross

that it would — better for the city, better for the company, so we would know where we stood, both sides of it.

Q. In what way did you become doubtful as to the right of the city to take the entire plant?

A. I doubted that from the first, when I first read the ordinance the city council had passed and saw the view that the Water Company took of it, that we were buying the whole plant, because I know something of the water works scheme, and I felt as a matter of law that we had no right to buy the works down at South Omaha.

Q. In what way did the view of the Water Company affect your view of the law?

A. Well I felt that if I was right the Water Company was wrong in its view of it. In other words the way the ordinance was drawn—the ordinance was passed after the law creating the Water Board—there was some language which was pretty broad which I noticed concerning the buying of the Water Works system now owned and operated by the Omaha Water Company. Then it referred to ordinance 423, section 14, something of that kind, and I saw that in the early beginning of the existence of the water board——

Q. I asked you a very plain question and you are making a very long answer to it. The question I put to you was what the position of the Water Company had to do with your view of the law?

A. Well it had only this——

Q. Did the view of the Water Company change your view of the law?

A. No the Water Company took the opposite view to my view of the law.

Q. Then it had nothing to do with forming your opinion?

A. No it had nothing to do with the forming of my opinion, but I had assumed right from the start that we could buy our water works in the city of Omaha. I soon learned that the water company took the opposite view that we could buy the whole plant.

539 Mr. HALL: I move to strike out that last answer of the witness as not being responsive to my question.

A. It had nothing to do with my forming my opinion in that sense, but I saw what the opinion of the water company was and it was opposite to my opinion.

Q. Why did you make a distinction in your own mind between buying the works in South Omaha and buying the works in Florence?

A. I made none at all, in my own mind, aside from this: of course, we would have to buy the source of supply, but so far as any water works for furnishing water to the city of Florence was concerned, I made no distinction from South Omaha.

Q. Was it your idea that you could buy a source of supply that was outside of the city, but you could not buy a line of pipe that was outside of the city?

A. We would buy the water works that——

Q. No, no, just the question.

A. I do not think the question is fully intelligent to my mind.

My idea was that we could buy the source of supply without buying the pipe that pertained simply to some outside towns. We could buy the pipes from the source of supply down.

Q. So you think you could not buy a line of pipe outside of the city?

A. Do you mean connecting the source of supply with the city?

Q. No: I mean a line of pipe outside of the city.

A. I would say that my idea was and is that you cannot.

Q. Why did you make that difference—from what line of reasoning?

A. Well, it might be that a city would have to go outside of its city limits to get its source of supply, and the pipes leading from that to the city of Omaha for the city of Omaha, pertaining to the city of Omaha, and the water works of the city of Omaha, we could buy that source of supply, and the pipes leading from the source of supply to the pipe system in Omaha, and buy the pipe system in Omaha, but we had no power to buy a water works system outside of the city of Omaha that pertained to other municipalities.

Q. I don't think you have answered the question.

A. Well, if I understand you, I have tried to.

Q. You claim the right to buy the source of supply at Florence?

A. Yes sir.

Q. And you claim the right to buy the pipe, all the mains, connecting that source of supply with Omaha?

540 A. Yes sir.

Q. And your idea is that you could cut off the Florence pipe line and not take it, that is the line supplying Florence from that main?

A. Yes.

Q. And your idea was in bringing this suit that you would have the Court direct the appraisers how to appraise the part that you proposed to take?

A. To determine the question as to whether or not we had the power to buy the pipe lines, or that portion of the entire plant that was located in other municipalities.

Q. Just the question, please?

A. Well, I want to answer you as to my ideas.

Q. I asked you whether it was your purpose in bringing that suit to have the appraisers appraise simply that line of pipe which you proposed to buy?

A. If the Court so determined.

Q. Well it was your purpose to have it determined that way?

A. If we could.

Q. It was?

A. If the Court would, yes sir.

Q. And to compel the appraisers to follow that determination?

A. Tell them what to appraise.

Q. And to make them estimate their values simply on that part of the plant which in your opinion you proposed to take?

A. Yes sir.

Q. Now, before you brought this suit, had you had anybody's opinion that it was not safe to buy the plant as a whole?

A. No; no more than there was others might agree with me. I relied upon my own convictions in regard to that matter.

Q. You understood, didn't you, that this case was brought in good faith, and not for the purpose simply of making a lot of litigation?

A. It was brought absolutely in good faith.

Q. For the purpose of accomplishing the definite objects which you have detailed as near as you could?

A. Yes, sir.

Q. Now, Mr. Congdon, you knew that this law suit which was about to be brought would be a very expensive and a seriously contested one, didn't you?

A. I imagined it would be seriously contested, because I knew — the position of the company was, and that it was an opposite position.

Q. You knew that the company would not allow its system to be torn to pieces if they could help it?

A. I knew that, of course.

Q. Well, you knew it from their attitude in the matter, and everything?

541 A. Yes sir; I knew it in that way.

Q. You yourself have personally stated that you would be in favor of buying the whole plant if you could legally do it, have you not?

A. I think I have. I have no objection to it, to-day, if it could be done.

Q. You see no objection to it, except the question of the want of power?

A. And the practical questions, also.

Q. So that you are ready to run into a law suit right away, in order to avoid a law suit which might happen in the future?

A. Yes sir; I thought we had better have it now than later; yes, that was my idea.

Q. But you didn't know whether you would have it or not?

A. No, but I felt reasonably confident that we would have.

Q. And in the fear lest you would have it you insisted on having it immediately?

A. Yes; I thought we had better have it now and have these matters determined rather than to wait.

Q. Now, in the injunction suit which you brought you ask for an injunction restraining the appraisers from valuing any of these other parts at all, did you?

A. I presume so, yes.

Q. You were not willing to have them appraise all the parts and let the courts decide which parts you should take, but you proposed to stop the appraisal right in the middle of it by an appeal to your view of the law?

A. That was always my idea that the outside matters had nothing to do with Omaha.

Q. In view of that fact, do you still say it was not your purpose to delay this appraisalment?

A. Well, it was my purpose. My personal purpose was to stop the whole appraisalment until we should get these questions determined as to what should be done.

Q. It was your purpose to delay this until you got your own way, if you could?

A. Until I got the way I thought was legally right in the matter—well, I wouldn't say that as you put it, "in my way;" I thought a certain way was right, and it was my purpose to stop the appraisalment until the Courts determined what was the right way. If we were to buy it all, and had the power to do it, and elected to do it all, I wanted the Court to say, because I felt we would have an appraisalment then that would amount to something, and if we were not it would stop now, and we wouldn't have any more money or time spent on the appraisalment.

542 Q. In the early part of your examination you were critical of the way in which the water company put in its inventories. You thought it was not the right way?

A. I thought a good deal of time was lost.

Q. You think that it is improper for the water company to try to have its own way of putting its property in, don't you?

A. Well, I wouldn't answer that yes or no. The water company would have its own way if it could in the matter, and determine its own course.

Q. But you regard that as improper?

A. Well, I thought it was hardly the right way to do.

Q. You thought the proper way for one to do who was selling a plant of this kind was to let someone else make the inventory, didn't you?

A. Well, I thought this—

Q. No; just the question now; did you think that was the proper way or not?

A. No.

Q. You didn't think that was?

A. No; I will answer that no.

Q. Well then; you agree that the proper way for them to do was to make their own inventory, don't you?

A. Yes sir.

Q. And the only question that you have for criticism now was whether they couldn't make it quicker?

A. I thought they could make it quicker.

Q. You based that in no small degree on Mr. Alvord's statement that if this inventory was ready they could make this appraisalment in a few weeks?

A. I never talked with Alvord; I talked with Governor Boyd, and he got his information from Mr. Alvord, he told me.

Q. Your information then came from Mr. Alvord that if the inventory was ready the appraisalment could be made in a couple of weeks?

A. Not entirely, but also from the letters that were gotten from

the various engineers that it would take that length of time—thirty days to six weeks, to make that appraisalment.

Q. Well, it has taken somewhat longer than that, hasn't it?

A. Yes sir.

Q. You do not impeach the standing of these appraisers?

A. No sir.

Q. You believe them to be honest men?

A. I think so; yes sir.

Q. You believe they are doing the best they know how?

A. Yes sir; but I think they didn't do it as well as they might.

Q. But Mr. Alvord has been very much mistaken in his idea as to what would be done as soon as they got the matter before them?

A. He seems to have been, yes sir.

Q. Mr. Mead, the chairman, announced that although this
543 had taken a long time to get the inventories in, that still the real work of the appraisers was about to begin?

A. Yes, some such remark as that.

Q. And didn't he say to you at that time with the concurrence of Mr. Alvord and Mr. Benzenberg, the whole Board of Appraisalment that this was a matter not of days or weeks, but of months?

A. He made that statement in open board; not to me personally.

Q. Well, you were there and he made it to everybody, yourself included?

A. Yes sir.

Q. Have you ever had anything to do with the appraisalment of as large a plant as this before?

A. No sir.

Q. Then you do not claim to be an expert on what is necessary to be done in putting in the inventories and schedules and plats of a large plant like the Omaha Water Works?

A. Yes sir.

Q. Your experience then, as to what ought to be done, might be regarded as the experience of an amateur?

A. I suppose so, yes sir.

Q. You were in a way connected with the beginning of this water works contract?

A. As I told you on direct examination, yes sir.

Q. Cooke, was brought here by the city, employed and paid by them to make a report?

A. Yes sir.

Q. And it was in pursuance of his report, made to the city council that these works were built, wasn't it?

A. Yes sir; made in accordance with his reports, except some changes made afterwards.

Q. The only person you ever heard talk about that outside of the city people was Flagler, wasn't it?

A. No; I can't tell you who they were, but I know there was other people.

Q. Can you name them?

A. I can name some of them. Flagler and two other men I re-

member; I can't tell you the names and then the Holly gentlemen, Dr. Hitchcock.

Q. Well, the people you were talking with were the Holly water works crowd?

A. Yes, and then they were followed afterwards; after they were disposed of. As I recollect it, there was some law suit about it; the council was enjoined. They came here and brought some pipe, then came the Omaha people, Shelton, S. R. Johnson, and Morse, took a hand.

Q. Don't you know that none of these men took a hand until after the contract was bid for?

A. No; Shelton, my memory is that Shelton was the head and front of it, and S. R. Johnson. Possibly you are right about the other men not being around at all. I have no recollection about Locke being around in the office at all.

Q. Do you not know that S. R. Johnson and Shelton were not known in this matter until Locke was declared by the Council to be the best bidder?

A. My recollection is not positive in regard to that matter whether they were in the office before or after.

Q. And don't you know as a matter of fact that the bid by Locke was a complete surprise to everybody, and that there wasn't anything known about it at all until it was put in there?

A. I can't answer that by yes or no. So far as I know nobody had ever heard of Locke before in connection with it.

Q. And wasn't it true that it was after Locke made his assignment to the City Water Works Company that Johnson and Shelton appeared on the scene?

A. No; I wouldn't say it was so.

Q. You wouldn't say it was not so, either, would you?

A. I wouldn't say it was not so either. My recollection is not positive whether it was before or after.

Q. The people that you do remember as talking about it there were the Holly Water Works crowd, that is so far as any talk was made before the bid was let to Locke?

A. I think so, yes sir.

Q. Now, Mr. Congdon, isn't it true that the course of that appraisalment before the Board of appraisers was this, that the water company submitted the plans and specifications of its work, showing the details of construction and everything connected with it to the city, and if the city made no objection to that, that then it was taken as true by the appraisers, and if the city did make objection to it, then the water company made proof of the correctness of the plans and maps?

A. I would say that was my impression, yes, as to the general course.

Q. Do you mean to say that that was not a proper way for the appraisers to get at what work was here?

A. Well, don't understand me as saying that it was in improper way.

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Q. That is all I have asked you—then you don't say it was an proper way?

A. I don't say it was improper in the sense of being wrong, or a thing of that kind.

Q. Do you mean to contend that in your view what the praisers should have done, that they themselves should have come here and spent all that time in hunting that out personally? Or the underground work as well as the work above ground?

A. Yes; in other words, by conviction today is that it might have come here and taken hold of this matter themselves and have done all that you done in six or seven weeks that it took 18 months to do, if they had gone at it themselves.

Q. And you, in your own mind, was perfectly indifferent as to whether about half of the work would have been left out or not?

A. No, I was not.

Q. Provided it could have been done quickly?

A. I supposed they were experts and knew how to go at it.

Q. You forget, don't you, that after they had all these plans which I have specified in their hands, that the Chairman told you himself that it would take months to work it out?

A. Yes; to go all through this work that you gentlemen had before them to do.

Q. Don't you know enough about appraisements to know that it could do ten times the amount of work with the plans before them that they could by simply going over the ground?

A. No.

Q. And it was your idea that these prepared plans were a hindrance and not a help?

A. A great many of them were no particular help to them.

Q. And it is from that line of reasoning that you have adopted the theory that all this was just a sort of a delay and didn't amount to much?

A. Well, your question is put in such a way that I want to be to both you and myself in making an answer.

Q. Yes.

A. I felt that they were expert engineers, and that they could take hold of this appraisalment, state what they wanted, go and visit the plant and ascertain how much pipe you had, and when it was laid, and look at your plans and specifications, and drive around, for instance on the street car crossings, and they could have done it in two days instead of looking at four or five hundred blue prints at street car crossings—they could see how many hydrants you had, and go all over that matter. That was my idea in the first instance, you and Mr. Woolworth probably know; but it took a different course, and the appraisers commenced to sit as a sort of court, instead of going at it and keeping at it—I felt they owed some duty to this city—they would sit when they got ready and when you people got ready to put in some more testimony.

Q. Is it from your idea, from your experience, which you concede to be that of an amateur; is it your idea that you could tell underground construction by looking at the surface of the ground?

A. No; but you can tell pretty well by digging up your pipes in certain places as to what the condition of the pipe is, and you could tell very quickly what your underground construction was.

Q. Your idea is that by digging it up you can tell what your underground work is?

A. What great amount of underground work do you have except the laying of pipe?

Q. Did you follow the course of the appraisalment?

A. Yes.

Q. The underground construction of that plant alone, to make the plats and Schedules of it, took five men working days and nights, months, to make it. Of course you don't know that, but these appraisers couldn't have gotten it in any less time.

A. What underground construction did it consist of?

Q. Oh, there is an immense amount, for instance—you take for instance the underground construction of these basins alone; I am not speaking of what is above the surface.

A. That is a matter you had specifications of, isn't it?

Q. There was only a part of it.

A. Anybody going and looking at that, I imagine that they could make up their mind as to what was there.

Q. Why of course, a man could do that if he didn't care whether he got it right or not.

A. Why, he could do it, an intelligent engineer could.

Q. It was from that line of reasoning that you made the criticisms you did make?

A. Yes; I criticised the Board for the reason that they didn't follow it up and get through with it; that is, on both parties, on both sides.

Witness excused.

JAMES A. BOYD, a witness on the part of the Complainants, is here called and duly sworn. Being examined in chief by John L. Webster, he testified as follows:

Q. Mr. Boyd, are you a member of the Water Board of the City of Omaha?

A. I am.

Q. What official position in the city did you hold in the year 1880?

A. I was President of the city council.

Q. You are the same Mr. Boyd who was subsequently Governor of the State of Nebraska?

A. Yes sir.

Q. In the year 1880, when Ordinance No. 423 was passed, and the contract was entered into between the city of Omaha and Sidney E. Locke for the construction of water works, were you then taking an active part in the formation of that ordinance, and the procuring of that contract so as to have been familiar with what transpired?

A. In a measure, I was, yes sir. In the first place I was very

instrumental in defeating the Holly Water Works system; and General Manderson, who was city attorney at the time consulted me very frequently with regard to the ordinance and the contract.

Q. Who were the persons most actively representing the city in the preparation and adoption of that ordinance and in the procuring of that contract?

A. Well, Charles F. Manderson was city attorney, sir and attended to the business. Of course, he consulted with various parties, and as I said before, with myself quite frequently.

Q. By virtue of your position as president of the city council, did you have much to do by way of consultation or otherwise, with reference to the form and substance of that ordinance and contract?

A. Yes; our purpose of course, was to get as good a contract for the city as we possibly could, and as I said, General Manderson drew up the ordinance. I had nothing whatever to do with that, although he consulted me with regard to its provisions, to a certain extent, not only as President of the City Council, but as a business man of the City of Omaha; and we took pains to inform ourselves with regard to the price paid for water by various cities throughout the country of the same population, or nearly so, as the City of Omaha, at that time.

Q. When that ordinance was drafted and adopted by the Mayor and Council, what was said or understood by the city and its representatives by the provisions in Section 14 of the ordinance as to what it was that Omaha was to pay for in the event it elected to buy the water works.

Mr. HALL: That is objected to as calling for a conclusion of the witness; as substituting the opinion of the witness for the judgment of a Court in this case, and further that the witness's statement of understandings is incompetent to affect the rights created by written contract, and for the further reason that the same is not connected with any party in interest in this suit, nor any person to whom, or through whom the defendants in this case, or the water company have any privity.

A. Well, my object, sir, was to have an ordinance framed so that if the city of Omaha desired to purchase a plant according to the terms of the contract, that they should pay for the buildings, the pumps, the pipes, the hydrants and everything of that kind, and for nothing else whatever, and that that clause saying that nothing should be paid for the unexpired term of the franchise was explained to me as covering the whole thing.

548 Mr. HALL: I move to strike that last answer out as being incompetent and not responsive, and for the reason that it is stating a conclusion of the witness, and is [*subsisting*] the opinion of the witness for the judgment of a court in this case, and further that the witness's statement of understandings is incompetent to affect the rights created by written contract, and for the further reason that the same is not connected with any party in interest in this suit, nor any person to whom or through whom the defendants in this case, or the water company have any privity.

Q. Did you at any time have any understanding, or was it suggested by anybody, so far as your knowledge goes, that if the city should elect to purchase the water plant that it should be required to pay in addition to the value of the physical plant any other sum of money whatever for what might be called going value?

Mr. HALL: That is objected to as calling for the conclusion of the witness; as substituting the opinion of the witness for the judgment of a court in this case, and further, that the witness's statement of understandings is incompetent to affect the rights created by written contract, and further that the same is not connected with any party in interest in this suit, nor with any person to whom or through whom the defendants in this case, or the water company have any privity.

A. The going value was never mentioned, nor never thought of, but as I said, our whole purpose was to frame an ordinance so that we would pay for nothing except the value of the pumps, the lands, the buildings, the pipes, the hydrants and everything pertaining thereto.

Q. Did you ever hear the claim made by anyone that if the city elected to purchase a plant it should have to pay any sum of money for what is termed going value prior to the appointment of the appraisers in this case?

Mr. HALL: That is objected to as immaterial, when he first learned.

A. Well, I can't give you the exact dates anyway, but the first that I knew about going value was the decision or opinion of Justice Brewer in the Kansas City case, when my attention was called to it, but I can't tell when that was. I never heard of such a thing before as going value.

Q. Governor, did you, yourself make inquiries, or cause inquiries to be made about the time of the appointment of the
549 appraisers in this case as to the probable length of time that might be required by the appraisers in arriving at a valuation of the water works, and if so, what was the result of your investigation and inquiry?

A. I did, yes sir; from Mr. Alvord.

Q. And what was the result?

Mr. HALL: That is objected to as immaterial what Mr. Alvord said as to what the length of time would be.

A. I made the contract with Mr. Alvord, and I agreed that he should receive—or we agreed that he should receive \$50 a day for the first ten days and \$35 a day thereafter, and he told me that if the water works company had the inventory in readiness that it wouldn't take over four or five weeks to make the appraisement, and he suggested, too, that a man in his office be employed to assist the water works company; I think a man by the name of Burdick, in getting up an inventory.

Q. You remember the fact, do you, that the Board of appraisers was organized on the 20th day of July, 1903?

A. I don't remember the exact date, but I was there, I guess, when they organized.

Q. And did you attend the meetings of the appraisers from day to day from that date on until the final submission in January 1905?

A. Almost constantly, I hardly escaped a meeting—I don't think I did, a single one.

Q. And at whose suggestion was it that delays and adjournments of meetings of the appraisers was brought about?

A. I don't know that it was anyone's suggestion, but it was because the inventory was not ready, they adjourned from time to time.

Q. You mean by that the inventory that was to be furnished by the water company?

A. Yes, by the water company.

Q. Before this suit was brought to determine the legal question and the duties of the appraisers, about how much time had the appraisers consumed in the appraisalment or put in other words, about what had the bills amounted to that the appraisers sent in to the water board that you may have been obligated to pay?

Mr. HALL: That is objected to as incompetent, immaterial and irrelevant and having no bearing on the issues in this case.

Q. Before you proceed to answer that, let me say, if you are not prepared to state that, you can let it go, and I can get it from Mr. Wright, or someone else.

A. I can't state the exact figures, because in the first year or so, the City Council ordered the bills paid.

Q. Well then, I will not pursue that, but will get it in 550 some other way. Governor, I want to call your attention to the same provisions in the affidavit of Mr. Theodore C. Woodbury to which I called the attention of Mr. Congdon, relating to the purpose of the water board to either delay or defeat the appraisalment by the bringing of this suit, and I ask you to state what the fact is as to whether or not the water board had any such purpose or intent?

A. Yes sir; I know about what the purpose of the water board was; it was to get a decision of the Court upon certain points, one of which was whether we had any right to purchase the works in South Omaha or not. The water board constantly insisted that the appraisalment should be brought in itemized; that is that the works in Dundee and the works in Florence, in East Omaha and in South Omaha should be brought in separately, but we did not insist that they should not also be brought in as a whole. We never could get a decision of the appraisers on that point. Mr. Alvord, of course, was in favor of bringing them separately; Mr. Benzenberg was opposed to it. I know this from what he told me, and Mr. Mead would not decide.

Q. When you say that Mr. Benzenberg was opposed to this, you mean by that that he was in favor of appraising the entire property in the aggregate without segregation?

A. Yes sir; I do.

Q. And do you know, Governor, whether or not that disagreement or controversy between the members of the Board was causing dispute, controversy, delay and expense?

Mr. HALL: That is objected to as leading, suggestive and immaterial.

A. I know that Mr. Alvord told me they spent a great deal of time discussing that question without coming to a conclusion.

Q. And what do you know of their controversy and discussions over the question of whether or not they should appraise what may be termed going value?

A. Well, of course, I understood that they talked a great deal over that also, but I can't tell you what they did; it was never determined; they wouldn't determine anything. Mr. Mead told me himself that he had no authority to insist—this is not in reply to your question, possibly—to insist on the appraisement being made at a certain date, that they had no right to do that; that we must give them plenty of time, and all that; that they were there as appraisers, of course, that he had no right or authority to do that, and on other questions he had to do the same thing. If you want to know my judgment about why this suit was brought I will say it was to determine these very questions to see what rights the appraisers

551 had; not at all to prevent the appraisement; not to acquire the works by condemnation, because that was never thought of and never talked of.

Q. Governor, I call your attention to a statement in the affidavit of Mr. Woodbury, to the effect that as the chairman of the water board you said that the city of Omaha wanted to buy the entire plant, and that in your opinion nine-tenths of the people of the city of Omaha wanted to purchase the entire plant. State what the fact is?

A. Well, that is not the language I used at all. The language I used when Mr. Woodbury talked to me was this; that there were grave doubts in the minds of the water board about our having authority to purchase the plant—that part of the plant in South Omaha and other outside places, but I believed the people of Omaha wanted to acquire the water works system if it could be done legally; that is about the language I used—but there were questions of law, of course, that had to be decided and that was one of the questions we wanted decided.

Q. And was that statement and conversation with Mr. Woodbury at the time when the controversy had arisen regarding the power and authority of the city of Omaha to purchase the water mains or pipes of these adjacent municipalities?

A. It was about the time the matter was before the appraisers but I couldn't give you the date, and the conversation I think took place in the Omaha Club, but I was only speaking as an individual, and not as a member of the board.

Q. This conversation then that Mr. Woodbury has seen fit to

refer to in this affidavit was simply a personal or a private talk between you and he in a social meeting in the Omaha Club House?

A. I think it was in the Omaha Club. It was in a private conversation.

Q. At that time then, you were not speaking as Chairman or President of the water board?

A. No sir; I was giving my individual opinion as a citizen of Omaha.

Cross-examination.

By Mr. R. S. HALL:

Q. Well, Governor, you don't mean that your individual opinion as a citizen of Omaha differs from your opinion as Chairman of the water board, do you?

A. I don't believe it would very much, but at that time as I said, I was not giving it as Chairman of the water board.

552 Q. But you were Chairman of the water board at the time you were giving your opinion?

A. Yes sir; and I would say to-day that I would be in favor of purchasing the works, if it could be legally done; I have nothing to conceal about that.

Q. Then there is no real distinction between your opinion as chairman and your opinion as an individual, is there? The only question in your mind is as to whether there is any legal objection to it?

A. Yes sir.

Q. Now, Governor, from whom and in what way did you begin to have doubts about the power of the City to buy this entire plant?

A. Well sir; I think Mr. Congdon first called my attention to it.

Q. Did he say that he and Mr. Wright had been talking about it?

A. I don't know as he said that; but I believe he said that he had grave doubts as to whether they had any right to do it or not.

Q. Didn't he in that conversation refer to Mr. Wright as expressing that opinion also?

A. I think not, sir.

Q. Then so far as you know, Mr. Wright did not have any doubts about this at all, did he?

A. I think he did.

Q. In what way did you form the opinion that he had doubts about it?

A. Well, in a conversation with him.

Q. Then he told you directly that he had doubts about it?

A. Yes sir.

Q. So, that the doubts that were expressed about that came from Mr. Congdon and Mr. Wright, did they, so far as you know?

A. Yes sir.

Q. Originated there?

A. I don't know where they originated.

Q. Well, so far as you know, that is the first you heard of it?

A. Well, I will answer by saying that I had grave doubts myself

about whether we had any rights to go into the streets of South Omaha and lay pipes and such things as that.

Q. Did you have these doubts before you talked with Mr. Wright and Mr. Congdon?

A. Yes sir.

Q. When did you first begin to have those doubts?

A. Well, I can't give you the date; but it was about the time the subject was first broached.

Q. Now this subject was broached by somebody?

A. Yes sir.

Q. Now, who were the people that first broached that, so far as you know?

A. To me?

553 Q. Yes sir; to you?

A. Well sir, I will tell you that. I had a talk with Andrew Rosewater first, since I come to remember, and Andrew Rosewater told me to insist that this appraisement be brought in itemized, so that if we had no right to purchase the works in South Omaha, we could purchase the works in Omaha and furnish a supply to South Omaha, through a meter. I believe that was the first conversation.

Q. When was that, as near as you can remember?

A. That was about the time the appraisers met.

Q. The beginning of the appraisement?

A. Yes sir; about that time; I cannot give you the dates. I think he was the first man that spoke to me about it. In fact, I am sure he was. I was trying to get all the information I could, Mr. Hall.

Q. And you think that Mr. Rosewater spoke to you about that?

A. Yes sir.

Q. And you thought that Mr. Rosewater was a pretty good man to inform you about any legal objection that should arise?

A. Not only legal objections, but about the works.

Q. But this was particularly a legal objection?

A. That was a legal objection, yes, sir; that was a legal objection.

Q. Mr. Rosewater occupied then what position, Governor?

A. City engineer.

Q. Did he at that time say to you that he had had any talk with the city attorney with reference to it?

A. No sir; not that I remember of.

Q. Then this expression of legal views was given in the capacity of city engineer, he being interested in it, as you understood it?

A. Mr. Hall I went to consult Mr. Rosewater in regard to the qualifications of certain engineers and to get names from him, and I corresponded with a dozen or so engineers, more than that, in Cleveland, St. Louis, Kansas City, Milwaukee and other places, and I made two trips or three to Chicago, to consult in regard to engineers, and I consulted with Andrew Rosewater about that business, and during his conversation he mentioned this to me, to get the works appraised, to have an itemized statement of each part of the works.

Q. Well, just to get this clear; you didn't regard that as an engineering proposition, did you?

A. No, but I regarded it as a very wise proposition.

Q. Well, you didn't consult with Mr. Rosewater, or receive his opinions about that in connection with his position as city engineer, or anything of that sort?

554 A. That is not what I went to him about at all, no sir; but that came up during our conversation incidentally. You wanted to know where I first heard of it; and I am sure that is where I first heard it.

Q. Well you didn't mean in your answer after you had said that Mr. Mead told he had no authority to compel the water company to produce its inventory before it got ready; you didn't mean, in saying that the suit was brought to determine that question, that the suit was brought to determine question of the inventory at all, did you, because that had been finished before the suit was brought?

A. No sir; I didn't mean that.

Q. What do you understand, Governor, that the term "going value" means?

A. Well, I don't know; I can tell you what I understand it to be; of course I can give it to you, but not in the language that Justice Brewer laid down.

Q. No—

A. Well, it is this, we have a plant here that is in operation. It would take so many years, one or two years to build a similar plant, and put it in operation and get as many consumers as they have to-day, and they should have payment for the works that were already completed, and this number of consumers, so that they would be recompensed for the time occupied in the completion of the new works; that is about what I understand as the going value.

Q. Well, do you make a distinction in your own mind between physical value and going value?

A. Well, there are distinctions certainly. Physical value is what the plant is actually worth; the going value—it is like selling out a business, the good will of a business is worth something.

Q. Your idea of physical value is what it is actually worth?

A. Yes, that is what I stated before; what the land and the pumps and the buildings and the pipes and the hydrants and all pertaining thereto is worth.

Q. Well, you mean by that, actually worth, just as they are?

A. Just as they are.

Q. With all the circumstances and conditions surrounding them just as they are?

A. Just as they are.

Q. Now, do you remember the time, Governor, that the water company submitted its final schedules to the Board of appraisers?

A. I don't remember the date.

Q. Well it was in January, wasn't it, 1905?

A. Yes sir; I think it was.

Q. Well you commenced your suit some six months after that, didn't you Governor?

555 A. Well, I can't give you the dates.

Q. Well, approximately that; it was commenced in July, 1905?

A. Yes sir; I think so.

Q. Or August, wasn't it, commenced in August some time—we will just get that exactly?

Mr. WEBSTER: That suit was commenced July 7th, 1905.

Q. Well, you do not in your own mind charge the delay that ensued between the final submission of the schedules to the appraisers, and the time you brought the suit, you don't charge that to the water company, do you, or do you?

A. Mr. Hall, I don't understand that the final inventory has yet been presented by the Water Company?

Q. You don't understand that?

A. No sir; I think there were some things left so they could be presented hereafter.

Q. But you understood that the appraisal was still waiting for these schedules to be produced?

A. I don't know what the understanding was on that point. I know that the Board adjourned here, and were not to meet for a certain time, and in consultation, it was thought best to have the Court decide what they could do; they didn't seem to know themselves what rights they had.

Q. Who was that consultation had with—the Board or whom?

A. Well, it was talked in the Board, the water board.

Q. Well, do you mean that the appraisers were a party to that consultation?

A. No sir; no sir; the water board.

Q. Well, now; did you have any talk with Mr. Alvord concerning the progress of this appraisement from time to time?

A. We certainly did.

Q. Did you urge him to hold out on whatever claims the city had to make?

A. No sir; never urged him to delay the appraisement a moment.

Q. But did you urge him to stand fast with the city?

A. I, of course, urged him to stand fast for the city's rights as much as possible, but the particular thing I urged him to do was to bring in an itemized inventory.

Q. You urged him to stand out on the different valuations that the city claimed, didn't you?

A. No, I did not pretend to do that; he was to exercise his own judgment.

Q. Who were you with when you saw him, Governor?

A. Oh, I saw him at the Iler Grand.

556 Q. Were you with Mr. Wright at any time when you saw him?

A. No; I don't think I was ever with Mr. Wright in Chicago or at the Iler Grand.

Q. What language did you use to him when you told him to stand up for the city's rights?

A. I never used that language.

Q. I misunderstood you then; I thought you said that a moment or two ago.

A. Only in regard to the itemized statements; in regard to bringing in an itemized statement, so we would know what to do.

Q. Did you have any other questions discussed between you and Mr. Alvord in connection with that?

A. I suppose we discussed a great many questions.

Q. Did you discuss anything in regard to values at all with him.

A. Yes sir.

Q. What discussions did you have with him in respect to values?

A. I had discussions with him in regard to the riprapping at Florence.

Q. And anything else?

A. Yes in regard to the price of pipe.

Q. Did you urge him to stand to the view advocated by the city in respect to the values of pipe?

A. I don't think we ever advocated the price of pipe or anything of that kind. I never knew that he did.

Q. No, but did you in that talk, urge him to stand by the values claimed by the city?

A. I don't know that the city claimed any value on pipe.

Q. But whether you knew it or not did you in that talk urge that he should stand by the values as claimed by the city, whatever they were?

A. Well Mr. Alvord had two ideas, one was that they should take a number of years and take the average price of pipe and the other was that they should take the price of pipe the day appraisement was made. I do not remember just exactly the conversation, but the price did not materially differ.

Q. I know Governor, but that is not the question. The question is whether you, in your talk with him, urged him to stand by the line of claims or the position taken by the city with respect to prices?

A. I never urged him.

Q. Did you ask him to or indicate to him that he should?

A. What stand did the city take?

557 Q. Well that is a matter that there may be some dispute about.

A. The city never took any stand at all in regard to the price of pipe.

Q. Didn't they?

A. No sir not as I know of. They may as individuals have expressed their opinions about the price of pipe, but they never took any stand.

Q. Did you urge upon him to stand by the price as expressed by individuals who claimed to represent the city's interests?

A. The only thing I said to Alvord in regard to the price of pipe was that I thought he should take a larger number of years and average, than what he told me the appraisers were about to agree upon. That is the only thing I ever said to him about it.

Q. How long was that before this suit was brought.

A. I can't tell you. It was the last time he was here I think.

Q. Where was it that you had this talk with Benzenberg in which

you said that he objected to an itemized statement separating Omaha and South Omaha?

A. I think it was in the city Hall off to one side when we were talking about it.

Q. Do you remember his language Governor?

A. No sir I do not only that he was opposed to it, that was all.

Q. You couldn't tell what he said?

A. Why he said that the works should be valued as a whole and purchased as a whole.

Q. Is that all he said?

A. I don't know as it was all.

Q. Substantially all?

A. Substantially so.

Q. From whom was it that you understood that the going value was a matter of discussion with the Board of Appraisers?

A. Mr. Alvord.

Q. From anyone else?

A. Well I don't know as I did.

Q. Did you get that information from any member of the Water Board or from any of the attorneys of the Water Board?

A. I got it from Mr. Alvord himself.

Q. Well is he the only one?

A. I may have had it from some others, but I know I got it from him.

Q. Did you get it from Mr. Wright?

A. I think not.

Q. When was it you got that from Mr. Alvord, Governor?

A. Frequently.

Q. What was the latest time that you got it?

A. I think the last time he was here. I asked him if the Board of Appraisers had decided on it yet.

558 Q. Did you see any of the Board of Appraisers a little while before this suit was brought you mean the time they came here and were served?

A. That is not the only time.

Q. Were you informed of that before or after you brought this suit?

A. Informed before it.

Q. That the matter of going value was a matter of discussion?

A. Well I don't know. I was informed by Mr. Alvord frequently that it hadn't been decided.

Q. Do you know the way in which the appraisers were induced to come here to be served with that writ?

A. No sir only that they were here on business.

Q. What business did they come here on?

A. Well sir I can't tell you.

Q. Well if you know, Governor, that they came here on business, you must know the business that they came on?

A. They must have come on business or they wouldn't have come, that is all there is about it.

Q. That is really nothing but your own surmise from the fact that they came?

A. That is all. I know nothing at all about it.

Q. Were you here or away when they came?

A. I was here, I think—(to Mr. Congdon) Wasn't I Mr. Congdon?

Mr. CONGDON: I don't know Governor.

A. (Continued.) I think I was here.

Q. No pretense was made to them that the Water Board desired to introduce some testimony before them?

A. Who do you mean—by whom do you mean that a pretense was made, who made the pretense?

Q. I say so far as you know personally—now I am speaking of your personal knowledge?

A. I only know that Mr. Wright went to Chicago, but I don't know what he did.

Q. There was no consultation in the water Board before he went there was there?

A. In regard to what?

Q. In regard to his going?

A. Yes sir, I think there was.

Q. Who was present?

A. I can't tell you that, but there was a quorum.

Q. Did he go to Chicago at the request or by the advice of the Water Board?

A. It was at his own suggestion that he went to Chicago.

Q. Did he say why he wanted to go?

A. Well I think he did. I think he wanted to consult with Mr. Alvord in regard to some matters.

559 Q. Is that the reason he gave?

A. I believe that was the reason, that he wanted to consult with Mr. Alvord.

Q. Did he say in that meeting or in any other meeting at which you were present that he would manage to get the appraisers out here so that they could be served in this city?

A. He never used that language while I was there.

Q. When was it agreed upon in the Water Board that this suit should be brought?

A. I can't give you the date.

Q. Where was it?

A. At a meeting of the Board I suppose in the city of Omaha.

Q. Was it done by resolution?

A. The minutes would show that.

Q. Well do you remember how that was?

A. I do not.

Q. Was it done at that meeting at which Mr. Wright proposed to go to Chicago?

A. Well I can't say as to that either.

Q. Did you understand at the time that he went to Chicago, that Mr. Wright went to Chicago, that this suit was to be brought?

A. As I understood about that time there was talk about bringing this suit to decide these questions, especially the point we wanted decided was as to whether we had the right to purchase the works of South Omaha or not.

Q. Were you consulted with reference to bringing this suit at all, Governor, and the nature of it?

A. Not any more than the other members of the Board.

Q. Well were you at all?

A. Why the matter was discussed in the Board, of course.

Q. When was that?

A. Well now I can't give you the date Mr. Hall. I have no memory for dates. Mr. Webster says the suit was brought July 7, and I presume it was a meeting previous to that.

Witness excused.

At this time, by agreement of all parties the further taking of testimony was adjourned until Tuesday, October 31, 1905, at 2 o'clock p. m. to same place, to-wit: Room 826 New York Life Building, Omaha, Nebraska.

At 2 o'clock p. m. October 31, 1905, parties met pursuant to adjournment, at Room 826, New York Life Building, Omaha, Nebraska, the following persons being present:

C. C. Wright, Esq., Counsel for Complainants, R. S. Hall, Esq., James M. Woolworth, Esq., Counsel for Respondents, Charles W. Pearsall, Examiner in Chancery.

560 Proceedings were as follows:

Stipulation as to depositions in Doc. "W" No. 194 omitted.

Mr. WRIGHT: I offer in evidence in behalf of the Complainant a certified copy of the Resolution of the Board of Trustees of the Village of Dundee, made on the 31 day of October, 1905, said Resolution having been adopted on the 22 of December, 1900.

The same is marked Exhibit 14.

Mr. HALL: This is objected to for the reason that there is no jurisdiction to offer any testimony in this case, and for the further reason that the same is not material under the bill.

It is understood, however, that the foregoing objections are not directed to the fact that the papers offered are copies.

Exhibit 14, being the Resolution last above referred to, is as follows:

"EXHIBIT 14, C. W. P."

Dec. 1, 1900.

A communication was presented from Omaha Water Company offering to put in six hydrants on mains already laid in Village and Village pay rental of \$60.00 per year on four of them.

Dec. 22, 1900.

I. S. Leavitt, introduced following resolution:

Resolved that we accept proposition of Omaha Water Company to put six fire hydrants in Village of Dundee on mains already laid in Village and said Village of Dundee to pay an annual rental of Sixty (60) dollars per hydrant for four hydrants payable semi-

annually Jan. 1st & July 1st of each year and two hydrants to be rented free.

That said hydrants are to be located as follows:

49th & Davenport sts.	N. E. Corner
49th & Cass sts.	N. W. Corner
49th & Webster sts.	N. E. Corner
50th & Webster sts.	N. E. Corner
50th & California sts.	N. W. Corner
51st & Cass sts.	N. E. Corner

Motion of Klopp that resolution be adopted, seconded, put to vote, which was as follows:

561 Hume, Yes.
Klopp, Yes.
Leavitt, Yes.
Marshall, Yes.
Mr. Chairman, Yes.
Affirm., 5.
Neg., 0.

STATE OF NEBRASKA,
County of Douglas, ss:

E. R. Hume, being first duly sworn, deposes and says that he has been clerk of the Village of Dundee since it was organized, Dec. 13, 1894, that the above is a true and correct copy of the minutes of said Village, relative to the installing of six fire hydrants in said Village by the Omaha Water Company. Further deponent sayeth not.

E. R. HUME.

Subscribed in my presence and sworn to before me this 31st day of October, 1905.

[SEAL.]

E. N. BOVELL,
Notary Public.

(End of Ex. 14 C. W. P.)

Note by the Examiner: The examination of the witness George W. Craig then followed, but as is explained at page 44 of this record, the testimony of the witness Craig is made to appear in this record (by agreement of parties), preceding that of the witness Congdon. See page 45 for testimony of witness Craig.

As is also set forth on page 71 of this record, at the close of the examination of the witness Craig, by agreement of parties, the further taking of testimony in this matter, under the notice herein, was adjourned until Wednesday, November 1st, 1905, at 5 o'clock, p. m.

Further proceedings at that time were as follows:

(See next page.)

OMAHA, NEBRASKA, WEDNESDAY, November 1st, 1905.

Pursuant to adjournment, all parties met at Room 826, New York Life Building, at 5 o'clock P. M. the following parties being present:

John L. Webster and C. C. Wright, Counsel for Complainant; James M. Woolworth, Counsel for Respondents; Charles W. Pearshall, Examiner in Chancery.

562 By agreement of all parties present, the further taking of testimony in this cause under the notice herein, was adjourned until Saturday, November 4th, 1905, at 9:30 o'clock A. M. to same place, to-wit: Room 826 New York Life Building, Omaha, Nebraska.

OMAHA, NEBRASKA, SATURDAY, November 4th, 1905.

Pursuant to adjournment, parties met at Room 826 New York Life Building at 9:30 o'clock A. M., the following parties being present:

John L. Webster and C. C. Wright, Counsel for Complainants.

None of counsel for respondents were present.

Proceedings were as follows:

See next page.

C. C. WRIGHT, being called and duly sworn as a witness, on the part of the complainants, testified as follows:

Direct examination.

By JNO. L. WEBSTER, Esq.:

Q. You may state your name?

A. C. C. Wright.

Q. And your age?

A. 46 years old.

Q. Your residence?

A. 4016 Cumings Street, Omaha, Nebraska.

Q. And your profession?

A. Attorney at law.

Q. What official position did you hold in the year 1903?

A. From May 26th, 1903, I held the position of City Attorney for the City of Omaha.

Q. From then up to what time?

A. Until March the 1st, 1905.

Q. And what relation did you sustain during that period of time and since then to the Water Board of the City of Omaha?

A. By resolution of the City Council at that time having charge of the matter of the appraisal of the Omaha Water Works, I was given charge of that matter in behalf of the City and of the Water Board. And sometime after resigning as City Attorney on March 1st, 1905, I was appointed as Attorney of the Water Board of the City of Omaha by said Water Board and now occupy that position.

Q. Did you attend the proceedings had before the appraisers who had been selected to appraise the water works?

A. I attended every open session of the Board of Appraisers.

563 Q. At or about the time of the appointment of the Appraisers had you then received any information or did you then have any knowledge as to about the length of time that would be consumed by the appraisers in making the awards if so, you may state your knowledge on that subject?

A. I had no direct knowledge in that regard, as I was not consulted by the Water Board until after the appointment of the appraisers or the selection of the appraisers.

Q. Now, Mr. Wright, I should like to have you explain, and you may without my repeating the questions, what transpired at the meeting of the Board, which caused the delays in completing the taking of the testimony, and by reason of which, no award had been made, stating in detail the points of contention between yourself on one side, and the representative of the Water Company on the other, and at whose instance delays were granted, and for what purpose?

A. The first meeting of the board was arranged to be held and was held on July 20th, 1903, and on the 1st day the appraisers asked for an expression of opinion as to the method of the appraisal. Mr. Woolworth made a statement for the Water Company and in the course of that statement he announced: "We are the seller-, and we are unwilling sellers, you are the purchasers, and you are very anxious to buy;" and farther on, in his statement, he said: "No we don't want to sell unless we have to. At that meeting I prepared and presented a statement of the views of the city in writing, a portion of which is mentioned in the affidavit of Mr. T. C. Woodbury filed in this case; in which I asked the board to make a separate appraisal of the property which was in the City of Omaha, and necessary for supplying the City of Omaha with water, and asked them to separate in their appraisal the different items of property. To this, the Water Company, through Mr. Woodbury and Mr. Hall and Mr. Woolworth, all objected. Nothing was done at this meeting except to introduce the ordinances of the city, and certain exhibits including the records of the Circuit Court of the United States in litigation which had been had in said court in reference to said company. I, at that meeting urged time and again that a definite time for the closing of the showing of the Water Company be fixed. The Water Company contended that they had a right to produce testimony and I insisted that the Board had a right to proceed in whatsoever manner they pleased, but that their valuation was to be placed on their own examination of the property, and that the only purpose that any statements or testimony could have, would be to aid them in determining the extent of the property which was not open to view. I asked that an inventory be prepared by the company by not later than September 1st, and the board announced that they thought that perhaps two months' time would be a reasonable time. The

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Water Company insisted that they could not be ready in two months, and the board finally fixed the next meeting as October 5th, 1903. I objected to so long a time, and the Chairman of the Board suggested that they would appoint some man in whom the board had confidence who could prepare an inventory such as the board thought necessary, and on behalf of the city I agreed to that proposition.

The Water Company refused to accept that. I offered at that meeting to select some one competent to make an examination of the property, to act with a man selected by the Water Company, who should present schedules of the property. To this the Water Company objected. During the entire meeting I urged that the company were taking a longer time than was at all necessary, and matters became considerably heated over it. In reply to my request that a definite time for the completion of the inventories be fixed, Mr. Woodbury and Mr. Hall both declared that they could not agree on any fixed time, and they wouldn't do so, but the Chairman of the Board intimated that he thought two months would be a reasonable time.

The meeting adjourned until October 5th, 1903. At that time the Water Board produced a schedule of the pipe lines showing the different sizes through the city, but the schedule did not include a list of hydrants or valves, or any details, but some blue prints of the distribution system.

The Water Company had not, at that time, as stated by Mr. Fairfield done anything more toward getting the inventory, and again at this meeting, it was suggested that the board should appoint a man to make an inventory of the property under the direction of the board, to which, in behalf of the city, I again consented, but the Water Company objected.

I then insisted that the appraisers should go in and make their own inventory so that one might be acquired within a reasonable time. At this meeting the Water Company also announced that it had not yet secured a man who should prepare the inventory. The meeting was then adjourned until October 19th, and at this meeting the Water Company announced that it had not prepared any further schedules and the matter of the inventory and the hastening of the proceedings was again discussed, and I again urged upon the Board that a definite time be fixed when the inventory should be presented by the Water Company and insisted that the Board did not have to wait upon the Water Company to produce the
565 evidence, but that it could proceed upon its own investigations.

Mr. Hall & Mr. Woolworth for the Water Company both protested that they could not get ready in a short time, and said that they didn't propose to be hurried in this matter.

The meeting then adjourned and the Board did not meet until November 12th, 1903. At that time the City presented a map showing the various conduit systems in the city, and the different character of pavement in the several streets, and the other matters within the knowledge of the city, which had been requested by the Water

Board and the Water Company offered schedules showing the number of hydrants, and meters.

The water company not being ready to make any further showing the meeting was again adjourned at the request of the Water Company.

The next meeting of the Board was held on December 15th and at this time the Water Company had only a few more schedules ready to present, and I again insisted that some steps—or some order ought to be made by the Board of Appraisers to hasten the presentation of this matter, and I charged the Company with delay, and Mr. Hall declared that it was impossible to proceed faster and I insisted that the Board had power to take it into their own hands to fix some definite time, or else proceed upon their own investigation.

The meeting was then adjourned and the Appraisers again met on February 8th, 1904. The Water Board presented some additional schedules and blue prints and on the 9th of February there was again a general discussion of the character of the inventory and a discussion of the time which was being consumed in the matter, and I again insisted that a definite time be fixed when the Water Board should close their showing, or that the Board of Appraisers should proceed without regard to the inventory; and the Board asked the Water Company when they could be ready to complete their statement, but the Company were unable, or at least refused to make any statement in regard to it. Mr. Phillips, who was then in charge of preparing the inventory for the Water Company was asked to fix a time when he could complete the statements, and he said he couldn't make a definite promise, but he thought six weeks would be sufficient, and Mr. Hall complained that I was hastening them unduly. A very sharp controversy arose at this time. Governor Boyd spoke up and said that the Board—that they had been nearly a year at this now, and urged that the Board proceed. Mr. Woodbury made a long statement in which he showed a good deal of feeling and announced that the Water Company proposed to take time enough so as not to leave out of the schedule one stone or stick, and 566 it did not propose to be hurried in the matter. His attention was called to the fact that he had made the same speech at the last meeting, and he said he proposed to make it at every meeting when the subject was raised. Heated remarks then passed between Governor Boyd and Mr. Benzenberg. Governor Boyd earnestly requesting the Board to fix some definite time to close these matters.

At the meeting on February 11, the matter was again before the Board and the City asked for a statement as to the time when the Company should complete its schedules.

Mr. Fairfield made a long speech and said in substance that they hadn't got so far along in their inventory yet that they could make any guess as to the time necessary to complete it.

The Members of the Board of Appraisers urged the Company to conclude the matter as early as possible, and being unable to get any statement as to when they could be prepared to go on with their showing the adjournment was taken for an indefinite time, with an arrangement with the company that as fast as it prepared its sched-

ules that they should present them to the City, so that they might be compared before the meeting.

The meeting was called October 21st, 1904, when the great bulk of the Water Company's schedules were introduced and testimony was commenced. They proceeded at that time and took the testimony of Captain Reynolds and Mr. Underwood and other persons. At the close of that session on the 28th of October, 1904, another discussion arose in reference to expediting the procedure; in which I again urged that the Water Company be required to complete its showing. The Board of Appraisers thought they had not authority to make such an order and therefore the meeting was adjourned.

The Board was called together again on November 25th, 1904, when additional schedules were offered by the Water Company. It was at this meeting for the first time, that they presented any showing as to real estate, and as to other matters which were known to them, and could have been introduced at the first meetings of the Board. Testimony was taken of a large number of witnesses, November 25th, 26th, 28th, 29th, and 30th, and December 1st, at which time the Water Company announced that they had completed their inventory.

On the second day of December, and on the 3rd day the City proceeded to introduce its testimony. An adjournment was then taken, however, until the 28th, being put over to that time to meet the engagements of the appraisers.

The Board met again on the 28th and continued through the 29th of December, 1904, and the evidence was concluded.

567 During the entire time the only request for time that was made at all by the City was for a one half day to investigate the schedules which had been presented by the Water Company and at another time, after the presentation of several hundred schedules a request was made that the City might have two or three days' time to check said schedules with a view of saving the taking of testimony.

No continuance was asked by the City and at every meeting the Board of appraisers was urged to complete the appraisalment speedily.

In reference to the contentions before the Board asked for in your question; during the entire proceeding there was a difference of opinion between the City and the Water Company as to what the appraisers should appraise and as to the manner of the appraisalment and as to the form of the return. On behalf of the city I insisted during the proceedings and upon the argument that the Board of Appraisers was without authority or power to appraise more than the property within the city and necessary for supplying the City of Omaha; and that the appraisalment as to those items such as the real estate and going value and matters which were particularly pointed out should be made separately.

The Water Company urged that the Board of Appraisers must appraise the entire property together and that it should return an award in aggregate of the entire property located in Omaha and in adjoining municipalities, and districts, as one entire appraisalment, and in the course of the argument upon that matter, Mr. Woodbury

stated that they would not have consented to any appointment of an appraiser except with that in view, and that the Water Company would not submit to an appraisalment which did not include all of the property. I, for the City, stated to the Board that in my view the question of the amount of property which could be purchased by the City under the Contract and the laws was a matter of law, which the Board could not determine, but if the Water Company insisted upon an appraisalment which should show the value of their entire property including that outside of the City of Omaha, I had no objection to the Board making such an appraisalment, provided it would make a separate and detailed appraisalment of the property which was within the city of Omaha and necessary for supplying said City. In the arguments before the Board, both the oral argument and the printed argument, the most of the time and space was taken in an argument before the Board of Appraisers to show on behalf of the Water Company that the Board must appraise the entire property as a unit, and without detail as to items or portions of the property. A question came up also as to certain real estate

which the City claimed was not appurtenant to or necessary 568 for the Water plant and in reference to certain real estate which the City denied the title of the Water Company to.

Mr. Hall announced that the Board of Appraisers could not try the title, that it was a matter of law. I thereupon insisted that a separate valuation be given to this property naming the several items of property and Mr. Hall insisted that it should all be included in one lump appraisalment. Is there anything further Mr. Webster, that you want?

Q. How many months of delay was caused at the instance of the Water Company for the purpose of producing maps and drawings?

A. From July 20th until December 1st.

Q. Give the years?

A. July 20th, 1903 until December 1st, 1904.

Q. During all that period of time were any delays asked by the City of Omaha or the Water Board?

A. Only for one half day at one time to inspect certain of their schedules that we might check them over and agree upon them if possible to save time in taking testimony, and another time, I asked about a day or two in which to do similar work.

Q. Do you know how many maps and drawings were presented by the Water Company to the Board of Appraisers?

A. I don't know the definite number but I think there was about 1200.

Q. State Mr. Wright, whether any considerable portion of the time of the appraisers was taken up regarding the water mains and pipes and hydrants etc., lying within the adjacent municipalities and whether or not any considerable portion of these maps and drawings presented by the Water Company related to property in the adjacent municipalities and not necessary for the operation of the water works in the city of Omaha.

A. Yes sir, they did. Both the time of their inspection of the plant and outside of the dates of the meetings I have given. They

made examinations personally of the South Omaha plant and of the works in connection with the packing houses and stock yards at South Omaha, and there was a great deal of time consumed by the Board in considering the separations of the property as shown by the schedules presented by the Omaha Water Company so as to show what was within the City of Omaha.

The Omaha Water Company presented other maps and schedules without making any separation as to what was in Omaha and in order to determine what was in Omaha it required a great deal of time of the appraisers and it required the city to go to a long and enormous expense employing some four or five men for about 569 six weeks in order to select and determine from the inventory presented what property was in Omaha. Their inventory was so presented that it was impossible without this labor to determine what was in Omaha and necessary to supply Omaha.

Q. Do you know, Mr. Wright, and if so, state the wages which were to be paid to the appraisers and how much money the City of Omaha was to pay and the amount of money which has been paid by the City of Omaha to these appraisers or the amount of the bills which the appraisers have rendered to the City of Omaha and the Water Board by the appraisers?

A. The chairman of the Board was to be paid fifty dollars a day one-half to be paid by the City and one-half by the Water Company and his expenses. The Appraiser for the Water Company was to be paid by the Water Company. The Appraiser selected by the City was to be paid by the City at the rate of fifty dollars a day for ten days, and thereafter at the rate of \$35 a day and his expenses. I can not give the definite amount of the bills which have been presented and allowed, but they amount to about \$4000 or over for the City's part on account of the appraisers.

Q. You may state whether or not the City and the Water Board were obliged to incur any expense by reason of the fact that the Water Company had presented its maps, diagrams and proofs of its property in the aggregate and had refused to separate the property in Omaha proper from that which was in the adjacent municipalities.

A. Yes sir, it did.

Q. Why?

A. Because from the schedules and blue prints and exhibits presented by the Omaha Water Company there was no separation of the parts of the plant which were in Omaha from those which were in adjacent municipalities and the Omaha Water Company refused to make any such statement or to furnish any information from which could be gained except the blue prints and schedules which were presented to the Board, and in order to determine what property was in the City of Omaha, it was necessary to take these schedules and from them work out the information as to what was in the city of Omaha and what was in adjacent municipalities. It was a long job and the City employed a number of men varying from three to five, and also had the services of Mr. Craig the Assistant City Engineer and the services of Mr. Cooley of Chicago, who was employed by the Board at a compensation of \$3000, and at least half of his

time was required in separating the parts of the property which belonged in Omaha and in the adjacent municipalities.

Q. Well, I don't believe you have answered my query yet.
570 I want to get at the aggregate expense, by reason of this conduct on the part of the Water Company?

A. By reason of this appraisalment being together—this inventory being together and not separated the expense made necessary on the part of the City to separate the portions of the plant exceeded the sum of \$2000.

Q. What is the fact as to whether the proceedings before the Board of Appraisers was so conducted as to give the Water Company the control of the production and introduction of evidence and of delays to the detriment of the interests and welfare of the City?

A. It was in this way; the Water Company insisted that it had a right to present evidence before this Board in its own way and take its own time therefor, and the Board thought they hadn't the authority to make any definite order about the matter. The Board desired to make its own inventory and suggested that it would appoint a man satisfactory to them to make an inventory, which they thought could be done in six weeks or two months, and the City requested that that be done but the Water Company refused to do that. The Board suggested that the Water Company might spend a great deal of time on details which the Board would not think necessary and that time would be saved if they could appoint a man known by them to be competent and familiar with appraisalment who could prepare a schedule for the Board, it being suggested that if any additions were desired to be made by the Water Company the City that they could be made afterwards. The Water Company insisted that it proposed to present its showing in its own way and in its own time, and it proposed to do it with such details that not even a nail or a stone should be omitted therefrom, and in presenting its schedules it presented a drawing of each separate street railway crossing and conduit crossing, and mains and schedules which had no bearing and shed no light upon the question of the value; and the appraisers were compelled through 18 months to sit by and see the Water Company presenting one schedule after another without power to complete the taking of testimony and in their opinion without power to fix the time when it should be presented.

Q. Mr. Wright, have you read over the affidavit of Theodore C. Woodbury filed in this case?

A. I have.

Q. And I wish to call your attention to certain paragraphs of that affidavit to the general effect that the Water Company has been anxious to sell its property and that it has not been responsible for the delay, and that the City had intended and elected to purchase.

571 I chase the entire system of the Water Works Company, and I wish to set forth and ask you to state what the facts are so far as you know within your knowledge.

A. In relation to the Company being anxious to sell; at the very first meeting of the Board of Appraisers, Mr. Woolworth as attorney for the Water Company stated that the Company was an unwilling

seller, and that "It didn't want to sell unless it had to," and Mr. Hall insisted during the proceedings that they would not be hurried about the matter, that they would take their time, and be finally began to show a good deal of anger, because I was pressing speedy action. It was announced in the proceeding by Mr. Woodbury that he would not submit to a sale unless they could sell everything owned by the Company.

The delays in the appraisalment were all caused by the failure of the Water Company to present its schedules and by its insistence that it should have time to make a drawing of every little item of property which it had.

Perhaps one of the meetings was not held within a week or two of the time it might have been held, on account of the arrangements of the appraisers, but the appraisers were ready to proceed at any time when the Water Company would proceed with that exception. No delays were asked by the City except a brief space in which to examine the mass of inventories which were presented by the Water Company. There was nothing said during the appraisalment by the City, that it consented to take the entire system and it was distinctly stated by me at the opening that in my view we had the power only to acquire that which was inside of Omaha and necessary for supplying Omaha. It was distinctly stated that under the terms of the ordinance by which we were proceeding that we were required to purchase and authorized to purchase and had elected to purchase only that part of the plant which was in Omaha, and necessary for supplying it.

Q. Did the City or any person representing the City give Mr. Woodbury to understand or any reason to understand or believe that the City intended to or had elected to purchase the Water system, pipes and mains outside of Omaha or in the adjacent municipalities.

A. Not in my hearing, and I know that in the Board meeting it was distinctly stated to the contrary.

Q. Mr. Wright I want to call your attention to the statement in Mr. Woodbury's affidavit, to the effect that you yourself stated that there might be a valuation made upon the entire plant as a whole including that which was located in and necessary for the supply of Omaha, South Omaha, Dundee, Benson, Florence and the City of Omaha?

A. The statement was made by me in connection with a demand that they appraise the property in the City of Omaha separately and alone, and in connection with the statement that we were required under the ordinance and under our contract to purchase only that which was in Omaha, and necessary for supplying Omaha, and was made as a concession to the contention that the appraisers might make such valuation if the Water Company desired it, so that when the appraisalment was completed, it might be in shape to prevent its claims. But it was distinctly understood, during the en — praisement was completed, it might be in the shape to present only power to purchase the plant that was in Omaha and necessary for supplying Omaha, and that it was required under the contract and under the ordinance appointing the appraisers

only to purchase such property as was in Omaha, and necessary for supplying Omaha.

Q. I want to call your attention to another statement in the affidavit of Mr. Woodbury to the effect that the bringing of the suit was for the purpose of preventing or delaying the completion of the appraisal?

A. That is absolutely false. When in the course of the appraisal, during the long delays and when the Water Company were insisting that they would not submit to any appraisal, except it included all of it in gross without separation the matter of the suit was first considered, and when it became reasonably certain that the Water Company were insisting upon this procedure, and it was ascertained that that matter was a matter of dispute and a matter of disagreement among the appraisers, and that they were consuming months of time in discussing the legal question as to whether or not the city had a right to purchase the property in the outlying municipalities, and when it appeared to the Water Board and to the Counsel for the Water Board that an appraisal was likely to be made in gross without separation of the property, the suit was commenced in order that the powers and duties of the Board in relation to this appraisal might be determined by the Court in advance of the appraisal as to what property the Board of Appraisers had a right to consider in their appraisal, and was done for the purpose of hastening the completion of an appraisal upon which this City might purchase the works.

Q. I want to call your attention to another statement in the affidavit of Mr. Woodbury to the effect that Counsel for the Water Board has openly declared that the purpose of this suit was to defeat the appraisal?

A. If he referred to me it is absolutely false because there has never been on behalf of myself as Counsel for the Water Board or as representing the City any other purpose than to complete this appraisal through the award of these appraisers, and it can be arrived at in such a way that a purchase can be made thereunder, and the suit was brought for the purpose of securing an appraisal of such property and in such manner that a legal purchase could be made.

Q. I call your attention to another statement in the affidavit of Mr. Woodbury to the effect that there was a distinct understanding with the city attorney, now counsel for the Water Board, that if the Water Company made extensions of water mains, that the hydrant rentals should be made and judgment should be confessed therefor?

A. I never talked to Mr. Woodbury about it, nor mentioned the subject to him, and there was no understanding of that kind with anybody representing the Omaha Water Company.

Q. Mr. Wright, did you yourself have knowledge of the fact that when Mr. Woodbury was in the City of Omaha some ten days or two weeks prior to the making of his affidavit that an effort was made by the Water Board to serve a subpoena on him that he might be examined and cross-examined as a witness; and which would have given him an opportunity to testify in the regular way, and that

he avoided a subpoena by getting out of town, and having somebody carry his overcoat and trunk away from his lodging place?

A. I knew about that and I went with the officers and tried to catch him at the train before he got out.

Q. During the course of this appraisalment, did the City of Omaha or the Water Board or you as the attorney representing the City or the Water Board ever give your consent to the appraisers including in their award anything for "going value?"

A. Never, but I always protested against any such valuation.

Q. During the proceedings did the representatives of the Water Company suggest to the appraisers that they should include in their award anything for "going value?"

A. They did.

Q. Upon that suggestion what did you do or say upon the point that if the Water Company desired any thing to be included for "going value" that they should produce before the appraisers and for your use, benefit and information the books showing their revenue and income, so that you would have something upon which to determine and make a calculation; what did occur upon that point?

A. I insisted that the Board had no power to award anything for "going value," and that if they were going to consider that question, that we had a right to see and inspect the books and records of the Company which would show their income, and the number of attachments, and the Water Company refused to produce
574 any books and said they would not produce any books, and would not let the City see the books; and they did not produce any books to the Board of Appraisers or for my use, or for my inspection, and they refused to make any statement as to the number of connections or the receipts of money.

Q. Was there anything presented to the Board of Appraisers which could be considered as a basis of assessing any sum of money for "going value?"

A. No sir.

Note by the Examiner:

There being no one present representing the respondents in the above entitled cause, to cross examine the witness, C. C. Wright, said witness was excused, with the understanding that he should appear for cross examination if counsel for respondents so desired.

JAMES E. BOYD, a witness on the part of the complainants, having been heretofore duly sworn and examined as hereinbefore set forth, was at this time re-called for further examination on the part of the complainants as follows:

Direct examination.

By Mr. JOHN L. WEBSTER:

Q. Governor, at the time these appraisalment proceedings were begun, do you recall a conversation between yourself and Mr. Fairfield, the manager of the Water Company, regarding the time he thought would be necessary to complete the making of maps and in-

ventories for the purpose of appraisement, and if so, what he said upon that point?

A. Yes sir, I had a conversation with Mr. Fairfield in regard to the time that would be necessary for the Company to present an inventory of what it had to dispose of, and he said that they were not ready just then to begin it, but they would be very soon and he didn't think it would take over six weeks time.

Q. Governor, did you know Samuel R. Johnson, and Milton Rogers and others, who were stockholders and officers in the City Water Works Company which was the Company which originally constructed the Water Works in this City?

A. Yes sir, I knew Mr. Johnson and Mr. Rogers.

Q. And you knew the fact did you, that they were connected with the City Water Works Company which built the plant?

A. I knew as soon as Mr. Locke bid upon the works that Mr. Johnson and Mr. Rogers were to have a large interest in it, but I didn't know to what extent.

Q. Did you have any conversation with them, or with
575 either of them over the subject matter of what he said—or rather of what the City should buy or pay for in the event that the City elected to purchase the plant under section 14 of ordinance 423, and if so, you may state what those conversations were?

A. Well, my recollection is very indistinct, but I know that the matter was talked over in regard to the right of the City to purchase the works, and in the event the City concluded to purchase the works according to the terms of the contract, which was at the end of twenty years or any time thereafter, I know that the understanding was that the City was to pay for nothing except the physical value of the work. I don't think that word was used, but it was the pipe and the fittings and the hydrants, etc.; that was all and it was perfectly satisfactory to Mr. Johnson and Mr. Locke and Mr. Rogers and that was their understanding also.

Q. Then as you understand it, Governor, they did not then understand or expect or anticipate, that in the event the City purchased, that the City should pay in addition to the value of the physical property, any sum of money for any other matter or thing that might be covered under the guise or name of "going value."

A. Such a thing as "going value" was never mentioned, and as I said before in my former testimony the clause that nothing should be paid for the unexpired term of the franchise was supposed to cover that entire work; nothing was to be paid except for the works, the physical value of the works.

Note by the Examiner:

No one appearing on behalf of the respondents in this case, to cross examine the witness, the witness was thereupon excused, with the understanding that he should appear for cross-examination if counsel for respondents so desired.

DISTRICT OF NEBRASKA, ss:

I, Charles W. Pearsall, Examiner in Chancery, for the Circuit Court of the United States, within and for the District of Nebraska, hereby certify that the foregoing testimony in the above entitled cause was taken before me at the times and at the places in the record thereof indicated; that before testifying each of the several witnesses was by me severally duly sworn to tell the truth, the whole truth and nothing but the truth; that the signature of each of the several witnesses to their respective depositions was waived.

CHARLES W. PEARSALL,
Examiner in Chancery.

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Cost of Taking this Testimony.

492 folios at 20c.....	98.40
Swearing 5 witnesses at 10c.....	.50
Preparing notice and 2 copies.....	.75
Certificate25
	<hr/>
	\$99.90

Endorsed: Filed Nov. 6, 1905. Geo. H. Thummel, Clerk.

That in the case of The Water Board of the City of Omaha and the City of Omaha, versus Daniel W. Mead et al., No. 209 Docket "W" of said Court, there was filed on November 29, 1905, a memorandum opinion, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

W-209.

THE WATER BOARD OF THE CITY OF OMAHA and THE CITY OF OMAHA

vs.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG, and
THE OMAHA WATER COMPANY.

W. H. MUNGER, D. J. (orally):

I think I may as well dispose of this question at this time.

It is unnecessary, and perhaps not proper, at this time to indicate what individual views I may have as to some of the matters in contention. I need only say that I think there is sufficient in the contention as to whether or not the entire plant of the Water Company should be purchased by the City, if part of it is purchased, or only such portion as is within the city limits proper. But that question ought not to be disposed of at this time upon a preliminary hearing, and should not be disposed of until a final hearing and disposition of the case.

There are some questions that require considerable consideration,

or at least ought to have more consideration than the court can give at this time.

It is doubtful whether, under the ordinance of 1880, under which probably the parties may be required to act as to whether it contemplates the purchase of any more of the water plant than is in the City of Omaha. It is true, on the other hand, I think, that the

ordinance which was passed by the City Council, under which
577 appraisers were selected and appointed sought at least to take the entire system of water works. I have reached this conclusion upon the argument, however, that the rights of both parties will be best subserved by entering an order that the appraisers appraise the plant as an entirety and as one thing, and then also specify what part of that is for the plant in the City of Omaha, including the power plant, pumping station, XC, at Florence. I think that is a part of the system to go with the part in the City of Omaha. In other words, assuming that, under the law and the ordinances, they are only required to take the plant as it applies to the distribution of water to the City of Omaha alone. I think, as a part of that plant, is the pumping station and intake at Florence. The order will be that they appraise the plant as a whole, as an entirety. That puts it in shape so that the Water Company, if their contention is correct that the entire plant is to be taken that they would have an appraisement of the entire plant. The report of the appraisers should show what part and portion of that value is made up of the twenty-five acres in question. I think there is enough controversy as to whether or not that being purchased in anticipation of the future, is, so far as these requirements are concerned, so far in the future that they ought to be appraised separately. Then I think that the portion of the distribution of the mains at Florence should be separately appraised. That may, however, stand on a very different basis than the portion of the plant at South Omaha, Dundee and East Omaha. It may be that one of the conditions of the Water Company being allowed to lay their mains through the streets of the village of Florence to the pumping station was that they were to furnish the village of Florence water. Suppose in going out of the City limits to get their water and locate their intake, it was necessary to cross a man's farm. They undoubtedly could exercise the right of eminent domain and get across, but suppose they made the agreement that, in consideration of the farmer giving them the right of way across, without any court proceedings to obtain the right by virtue of the power of eminent domain, that they made a reasonable agreement with him that, in consideration of their right to cross his land to lay their mains, to excavate when necessary to repair their pipes, they were to furnish him such water as he would need for his farm during the existence of the use by the Company of such right of way. I am disposed to think that would be a reasonable condition and one that the city would be required to accept and take.

It may be the same principle would apply so far as the distribution of the water in Florence is concerned, although the
578 city might not be required to take the plant so far as it applies to South Omaha, Dundee and East Omaha.

There are two lots, described as government lots, I think. They should be appraised separately. The distributive mains in Florence should be appraised separately. Those in Dundee East Omaha and South Omaha may be appraised as an entirety. It is not necessary to appraise them separately, because it would seem from anything I can see in the pleadings that if the City of Omaha has to take South Omaha then it also would be required to take Dundee and East Omaha.

The contention of the City that the mains through the city of Omaha proper have been constructed larger than necessary because of furnishing water to South Omaha, Dundee, and East Omaha, and that some deduction should be made on this account, is not well taken. The Water Company, in my judgment, had a right, in putting in the mains, to anticipate future growth.

The order will be for appraisement of the entire plant, then specifying what part of that is made up of the twenty-five acres referred to; what part of the two lots referred to; what part is made up of the portion of the plant at Dundee, East Omaha and South Omaha. So that the appraisement will show not only the value of the plant as an entirety, but the value of the plant as it is in the City of Omaha, with the pumping station and the intake at Florence.

The order will be for a mandatory injunction, directing the appraisers to make the appraisement in this manner; and, while it has been stated by counsel that there is no precedent for such an order, nothing is shown against it, so it is an open question, and it seems to me that with the dispute between the parties as to what are their respective rights under the contract it is proper for a court of equity to construe the contract, and the court's construction will be given of course after the appraisement is made. But if the appraisement is made in the manner indicated, then it seems to me that whatever adjudication the court may render as to rights of the parties under the contract a new or second appraisement may be avoided.

The appraisers should also state what portion of the value of the whole is for good-will, as we may call it, or the plant as a going concern. That should be appraised separately; that is, appraised so as to indicate how much of the value they attach to the property as a going concern, so much as attaches upon the plant as a going concern in Omaha, and the proportion as a going concern for
579 South Omaha, Dundee and East Omaha, and the court will determine on the final hearing whether that is a matter which is proper to be considered. It seems to me that the appraisers can have no difficulty in segregating these values as I have indicated.

Counsel will prepare the proper order and submit it to opposing counsel, and if you are unable to agree the court will determine what its provisions should be.

Mr. HALL: Will your Honor note an exception?

The COURT: Yes, but in the order provide for an exception.

Mr. HALL: There is one thing I do not quite comprehend. I do not know just what is meant by government lots.

Mr. WRIGHT: There are certain government lots down near the pumping station.

The COURT: The city claims there are eight or ten lots that should not be considered, but I think there are only two that should be appraised separately. They are described as government lots, and the allegation is that they belong to the United States government.

Mr. WRIGHT: I think your Honor is mistaken as to the situation of those lots. They are described as government lots but they are taken from the original organization obtained from Mr. McCormick to the City of Omaha, described as government lots, but there are two lots at Cuming street that are described as land property.

The COURT: Property that in the petition is indicated as property that is not used in connection with the water works but rather used for rental purposes solely.

Mr. HALL: That is a different thing.

Mr. WRIGHT: There is a question about those government lots. The city claims that they are the owner of the lots and they are being occupied by permission but we would ask that they do not include the valuation of that property because they are in that situation.

The COURT: If they have been used all these years I think they are part of the water plant.

Endorsed: Filed Nov. 29, 1905. Geo. H. Thummel, Clerk.

Thereupon, to-wit: There was offered in evidence in the case of Omaha Water Company vs. City of Omaha, No. 74 Docket 580 "X," the order entered November 29, 1905, in the case of Water Board of City of Omaha, et al., vs. Daniel W. Mead, et al., No. 209 Docket "W," which said order is in words and figures following, to-wit:

In the Circuit Court of the United States, Within and for the District of Nebraska.

THE WATER BOARD OF THE CITY OF OMAHA and THE CITY OF OMAHA, Complainants,

vs.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG and THE OMAHA WATER COMPANY, a Corporation, Defendants.

Order.

The above entitled cause having come on to be heard on the 6th day of November, 1905, upon the application of complainants for a temporary injunction as in the Bill of Complaint prayed, and the same having been presented to the Court upon the Bill of Complaint and the Answer of the Omaha Water Company, and the evidence having been argued to the court by counsel for the respective parties, and the court being fully advised in the premises, it is

Ordered, that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, as a Board of Appraisers appointed for the purpose of appraising the value of the system of water works operated

by the Omaha Water Company, in making said appraisement, proceed in the manner and form as hereinafter ordered and directed.

1. It is ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, make one appraisement which shall include the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the City of Omaha and vicinity.

2. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, make a separate appraisement and award which shall include the intake, pumping station and reservoirs at Florence, the necessary mains connecting the same with the water works within the corporate limits of the city of Omaha, and the property connected with and used as a part of its water plant within the corporate limits of the City of Omaha, excluding therefrom the portion of said water plant in South Omaha, Dundee, East Omaha, and the distribution mains in Florence; but stating therein separately the values put upon the following property, to-wit: the west twenty-five (25) acres of the south half (S. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section seven (7) township fifteen (15) range thirteen (13); the north fifty (50) *fifty* feet of lot seventeen (17), the south forty-two (42) feet of the west ten (10) feet of lot eight (8) block (2) of Armstrong's Addition to the City of Omaha.

3. It is further Ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in their award make a separate appraisement and return of the value of the property of the Omaha Water Company being within the corporate limits of the City of South Omaha disconnected from the rest of the plant.

4. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in making their award, make a separate return of the valuation put upon the property of the Omaha Water Company in East Omaha, disconnected from the rest of the plant.

5. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in making their appraisement, separately state and report the value of the property of the Omaha Water Company being within the limits of the Village of Dundee, disconnected from other parts of the plant of the Omaha Water Company's system of water works.

6. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, in making their appraisement and award, separately find and state the value of the water mains, pipes and hydrants of the Omaha Water Company in the City of Florence used for the purpose of supplying the City of Florence and its inhabitants with water, separate and distinct from the intake, pumping station, reservoirs and mains necessary to connect the same with the City of Omaha, such valuation to be the value of the property of the Omaha Water Com-

pany's system of water works within the City of Florence other than the portion mentioned in the second paragraph hereof.

7. It is further ordered that the said Daniel W. Mead, John W. Alvord and George H. Benzenberg, acting as said Board of Appraisers, if they shall find and include in their appraisal of the value of all the property of the Omaha Water Company as mentioned in the first paragraph, that the Omaha Water Company has a going value as distinguished from the unexpired franchise, that
582 they separately state and report the amount thereof as a distinct and separate item of valuation.

They shall further separate and state the amount of such going value upon that part and portion of the water plant as described in the second paragraph of this order.

8. It is further ordered that the appraisers aforesaid make and return the aforesaid values, as far as practicable under the evidence and to the best of their judgment, as of the date of the award.

November 29, 1905.

W. H. MUNGER, *Judge*.

Endorsed: Filed Nov. 29, 1905. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: There was offered in evidence in the case of the Omaha Water Company vs. The City of Omaha, No. 74 Docket "X", the Depositions heretofore taken in a suit pending in the U. S. Circuit Court, for the District of Nebraska, Docket "W" No. 209, wherein the Water Board of the City of Omaha, et al., were complainants and Daniel W. Mead, et al., were defendants, to-wit: the depositions of W. W. Hartley, John L. Webster, Andrew Rosewater and C. O. Lobeck, with the exhibits attached thereto and filed in said cause on the 3rd day of February, 1906, which said Depositions are in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

DISTRICT OF NEBRASKA ss:

No. 209. Doc. "W."

THE WATER BOARD OF THE CITY OF OMAHA and the CITY OF OMAHA,
Complainants,

vs.

DANIEL W. MEAD, JOHN W. ALVORD, GEORGE H. BENZENBERG, and
THE OMAHA WATER COMPANY, a Corporation, Defendants.

Testimony taken on behalf of the complainant, the Water Board of the City of the City of Omaha, and the City of Omaha, under the 67th Rule of the Supreme Court, as amended, pursuant to the annexed notice, before Charles W. Pearsall, Examiner in Chancery, of said Court, at Room No. 826, New York Life Building, in the

City of Omaha, County of Douglas, in the State of Nebraska, beginning at the hour of nine o'clock A. M. December 30th, 1905.

583 Present: Carl C. Wright, Esq., John L. Webster, Esq., Solicitors for Complainants.

J. M. Woolworth, Esq., R. S. Hall, Esq., Solicitors for Respondents.

It is hereby stipulated and agreed that the testimony may be taken in shorthand by Charles W. Pearsall, the Examiner before whom this testimony is being taken and by him extended into longhand.

It is further agreed that the signatures of the witnesses to each of their respective depositions is waived.

W. W. HARTLEY, a witness on behalf of the complainants is here called and sworn. Being examined in chief by Carl C. Wright, Esq., he testified as follows:

Q. State your full name?

A. W. W. Hartley.

Q. Where do you reside?

A. The City of Omaha.

Q. What is your business?

A. I am an abstractor.

Q. And familiar with the records of Douglas County, Nebraska?

A. Yes sir.

Q. And you are now employed in what capacity?

A. As city abstractor and title examiner of the city of Omaha.

Q. Have you made an examination of the records of the Register of Deeds of Douglas County, Nebraska, particularly in reference to the lands lying around the Burt street station of the water company, known as Government Lots 2, 3 and 4?

A. Yes sir.

Mr. HALL: You ought to give the Section and Range.

Q. In what section are those lots 1 and—

The WITNESS: I think he wants Lots 3 and 4 in Section 14, township 15, range 13 East.

Mr. HALL: Lot 2 runs down to Jones street. Lot 2 don't get into this controversy at all.

The WITNESS: Lot 2, I think, is owned by the Byron Reed estate.

Q. So Lot 2 down there is not in the vicinity of the water works?

A. No sir.

Q. State to the examiner what, if any, deeds are shown of record, where deeds can be found, in the office of the Register of Deeds of Douglas County, Nebraska, in reference to these Government Lots?

A. In the numerical index.

Q. Well, state particularly where the deeds are recorded,
584 and then we will produce the copies of the deeds, I want you to give now the derivation of whatever title there is in these Government Lots 3 and 4 and we will supply the copy of the deeds afterwards.

A. Well, these Government Lots are entered by John McCormick, and he got title from the United States, and that is recorded in Book "N", page 54, Government Lot 3. United States to John McCormick for Government Lot 4, Book "N", page 46. Then on July 5th,

1859, John McCormick, deeded to D. D. Belden, Mayor and Trustee, these Government Lots 3 and 4, deeded to him in behalf of the claimants of the original city of Omaha; Book "L", page 144.

Mr. HALL: I object to the statement of the witness as undertaking to give the contents of a written instrument.

A. (Continued) And that is about all except these tax deeds here, and here is a deed from Henry Bolln, treasurer to Charles Corbett, Book 135, page No. 39, for Government Lots 3 and 4; then Corbett and wife deed to Byron G. Burbank, recorded Book 135, page 47, undivided one-half. Then Charles Corbett to Cynthia Ratekin, this deed is recorded Book 173, page 234. Then comes decree in the United States Court affecting these Government Lots 3 and 4. I think that is in the water works suit.

Q. Where is it recorded?

A. Recorded in Miscellaneous Book 14, page 481. Then comes deed from E. S. Dundy, Jr., special master commissioner, to the Farmers' Loan and Trust Company, trustees, Book 205, page 253. Then Farmers' Loan and Trust Company, trustee, deed to Omaha Water Company, book 203, page 537.

Mr. WRIGHT: We now offer in evidence a certified copy of each of the several deeds and instruments referred to except the decree referred to in Book (Miscellaneous) 14, page 481, and the deeds referred to—one from E. S. Dundy, Jr., special master commissioner to the Farmers' Loan and Trust Company, trustees, recorded in Book 205, page 253, and the deed from the Farmers' Loan and Trust Company, trustees, to the Omaha Water Company, recorded in Book 203, page 537.

Mr. HALL: We object to the introduction of each of the Exhibits offered, for the reason that each of them is incompetent, irrelevant and immaterial.

The Exhibits referred to in the above offer are hereto attached, and are marked as follows:

Exhibit 1. Patent, United States to John McCormick, Government Lots 2 and 3.

585 Exhibit 2. Patent, United States to John McCormick, Government Lot 4.

Exhibit 3. Deed, John McCormick and wife to D. D. Belden, Mayor, Trustee.

Exhibit 4. Deed, from Henry Bolln, County Treasurer, to Charles Corbett, as same appears in Book 135 at page 39 of the Deed Records in the office of Register of Deeds.

Exhibit 5. Deed, Charles Corbett and wife to Byron G. Burbank.

Exhibit 6. Deed, Charles Corbett et ux., to Cynthia A. Ratekin.

Q. Mr. Hartley, is there any deed shown of record in the office of the Register of Deeds of Douglas County, from the City of Omaha to the American Water Company, or to the Omaha Water Company?

A. There is not.

Q. Have you examined to know whether there are any records of the City of Omaha authorizing any such deed or not?

A. Why, I don't think there is any such deed. I have made search for such.

Q. Where, Mr. Hartley, do these Lots lie, if you know, in reference to the pumping station near the foot of Burt Street in Omaha?

A. Right directly east, between that and the River.

Q. Lying along the river front?

A. The Missouri River, yes sir.

Q. Have you examined to know whether there was ever any deed put of record from the City of Omaha, to the streets and alleys surrounding the Burt street station near Blocks 2 and 328 in the City of Omaha?

A. I made such an examination, yes sir.

Q. Did you find any such deed or any authorization of it?

A. There is a deed there to the Union Pacific Railroad Company.

Q. I mean to the Omaha Water Company or any of its predecessors?

A. No sir.

Q. Did you find any deed or any authorization of any such deed?

A. No sir.

Q. Do you know the location of the tract of land described as the west 25 acres of the south half of the northeast quarter of Section 7, in township 15, range 13, situated near Krug's Park in Douglas County?

A. Yes sir.

Q. Can you state whether or not that lies within the corporate limits of the city of Omaha?

A. It does not lie within the corporate limits.

Q. It lies outside of the corporate limits?

586 A. Outside of the corporate limits about a quarter of a mile west.

Q. Do you know whether there are any water works buildings or construction on such property?

A. No; I do not.

Q. You don't know?

A. No sir.

Q. Do you know the location of the north 50 feet of Lot 17 and the south 42 feet and the west 10 feet of Lot 18, Block 2, in Armstrong's addition to the City of Omaha?

A. Yes sir.

Q. Have you made an examination to see whether there are any water works or machinery connected with water works upon said lands?

A. Yes sir. There is none except a hydrant in the yard.

Q. Is there any addition that you want to make to your testimony?

A. There is a deed from the American Water Works Company, the record shows here, to the American Water Works Company, Book 157, page 195.

Mr. WRIGHT: I do not offer that in evidence.

Witness excused.

JOHN L. WEBSTER, a witness on the part of the complainants, here called and duly sworn. Being examined in chief by Carl Wright, Esq., he testified as follows:

Q. You may state your name to the Examiner.

A. John L. Webster.

Q. You are attorney at law, and one of the attorneys of the Water Board in this action?

A. Yes sir.

Q. Are you also attorney for Delos A. Chappell?

A. Yes sir.

Q. And have you in your possession any deeds to the lots described in paragraph 21 of the bill of complaint in this action?

A. I have in my possession an original deed from Victor C. Lantry, and Mary M. Lantry, his wife, to Frederick H. Mills, dated the 22nd day of November, 1888, for the lands described in paragraph 21 of the bill of complaint, excepting Block 9.

Mr. HALL: I move to strike out the answer of the witness as being an endeavor to give the contents of a written instrument that has not been offered in evidence.

Mr. WEBSTER: Complainants offer in evidence said deed last above described, reserving the right to retain the original and produce the same upon the hearing, and the Examiner will take a copy of said deed to be incorporated in the minutes of the testimony.

Note by the Examiner: Copy of the deed above offered is attached to this deposition and is marked Exhibit 7.

Mr. HALL: The defendants object to the deed being received in evidence for the reason that the same is irrelevant and incompetent referring to the deed marked Exhibit 7.

Mr. WRIGHT: You may proceed now, Mr. Webster.

A. I also have in my possession the original deed from Frederick H. Mills and wife to Delos A. Chappell for the property described in paragraph 21 of the complainants' bill of complaint, and which said deed bears date the 21st day of September, 1892.

Mr. WEBSTER: The complainants now offer in evidence the deed last above described, reserving the right to retain the original and produce the same upon the hearing, and the Examiner shall take a copy of said deed, to be incorporated in the minutes of this testimony.

Mr. HALL: Defendants object to the introduction of the deed referred to last above, for the reason that the same is irrelevant, incompetent and immaterial.

Note by the Examiner: A copy of the deed last above described is attached to this deposition and marked Exhibit 8.

A. (continued). Said property described in the said deed is located in the vicinity of the water basins at Florence, and constitutes a part of the Florence property, and Lots 6 and 7 in Block 29, and Lots 5, 6, 7 and 8, in Block 38, are within the limits of the water basins at Florence, according to a diagram which has been shown.

to me, coming from a draughtsman in the city engineer's office, as I now recall it. I believe I should make a modification as to that statement; perhaps a portion only of some of the lots mentioned are underneath the water basin.

Mr. HALL: Do you intend to offer that diagram, Mr. Webster?

Mr. WEBSTER: No, I haven't that where I can.

Mr. HALL: Then I will move to strike out the statement of the witness as to where these lots are situated as shown by the diagram, because it is evident that he states from information and not from his own knowledge.

588 Q. Did you state, Mr. Webster, whether there was any conveyance by those grantees to the water company?

A. No, I did not. So far as my knowledge goes, Mr. Chappell has never deeded those lots to any person whomsoever; no person or company whomsoever. I may state further than that that there is a suit pending in the United States Circuit Court for the District of Nebraska, in which E. Hyde Rust, former Receiver of the American Water Works Company, filed a petition, in which C. H. Venner, Frederick Mills and Delos A. Chappell were made defendants, praying among other things that Chappell might be decreed to hold the title to this property in trust for the benefit of the American Water Works Company; and which matter has never been disposed of, and is still pending in the United States Circuit Court.

Mr. WEBSTER: Which pleadings we offer in evidence and will produce the same upon the hearing of this case.

Q. Anything further, Mr. Webster, about that?

A. That is all I know.

Cross-examination.

By Mr. R. S. HALL:

Q. Mr. Webster, did I understand you to say that no deed had been made of that property by Mills to the Water Company?

A. No; I didn't say that.

Q. What is it?

A. I didn't say that.

Q. I will ask you then, don't you know that prior to the deed to Mr. Chappell, that a deed was made by Mr. Mills to the Water Company, and haven't you been so informed?

A. No; I don't know that.

Q. Haven't you been so informed?

A. No.

Q. Haven't you been so informed by Mr. Venner?

A. No sir.

Q. Haven't you been so informed by Mr. McIntosh?

A. No sir.

Q. This proceeding and bill by E. Hyde Rust which you speak about, and the records to which you have referred and offered are the proceedings in Court to which you refer in your bill filed in this case, are they not?

A. I don't recollect about that.

Q. These proceedings you speak of in that bill filed by E. Hyde Rust are the only proceedings pending over in the Federal Court as affecting that lot that you know anything about, aren't they?

A. That is all I know about.

Q. Is there an answer on file there to that petition of Rust's?

589 A. I think so. That is my recollection, but I wouldn't be positive about that. That matter was not in my charge when those pleadings were filed. I only speak from impression.

Witness excused.

ANDREW ROSEWATER, a witness on the part of the complainants being called and duly sworn, testified as follows:

Examined in Chief.

By CARL C. WRIGHT, Esq.:

Q. State your full name to the Examiner.

A. Andrew Rosewater.

Q. What official position do you hold in the City of Omaha?

A. Civil engineer.

Q. What is your profession and business?

A. Civil engineer.

Q. Are you familiar with the works, the character of the works belonging to the Omaha Water Company?

A. I am.

Q. What would you say, Mr. Rosewater, as to whether or not the plant and works of the Omaha Water Company is depreciating in value with time and use.

Mr. HALL: That is objected to as immaterial, irrelevant and incompetent.

A. I would say that the plant and material in use are steadily depreciating.

Q. What would you say as to the amount of that depreciation annually?

A. I would estimate that depreciation as being somewhere between fifty and seventy-five thousand dollars per annum.

(Cross Examination see next page.)

Cross-examination.

By Mr. R. S. HALL:

Q. What way do you figure that?

A. Of course, since I have come home I have hastily computed it, but it is only an approximate statement.

Q. When was that?

A. This morning.

Q. That is since you were called in here?

A. Yes sir.

Q. That was about an hour ago?

A. Within an hour. I would arrive at it in about this way; first

of all, the pipe system, this being on a liberal basis, assuming the longevity of pipe at 100 years, the depreciation at one per cent per year, so that would make approximately \$15,000.00. The valves and hydrants and other appurtenances would depreciate more than that.

The machinery I would estimate, depreciates at the rate of 4 per cent per year, and that would bring the total up to somewhere between \$50,000 and \$75,000 a year.

Q. What was the value at which you took the machinery?

A. Taking in the machinery, reservoirs, and everything off handed at a million and a half.

Q. What do you include in that?

A. Oh, as I have stated, I haven't gone into any detail of this matter; otherwise it would take me considerable time to go into that. I have simply given what I consider a safe off-hand estimate. The pumping plant, of course, is a part of the machinery, the greater part of the machinery, and the pumping plant depreciates in two ways; first, in the wear and tear of the machinery, depreciation by wear and tear; secondly: the capacity, the economic capacity of pumping machinery as years go by—

Q. I don't wish to interrupt you, but I asked you simply what you included in that. Can you tell me just what you include?

A. Oh; I have not gone into any detail, I say, for I can't do that in a moment.

Q. That is just a kind of a general estimate?

A. It is a general estimate which I consider within the lines of safety.

Q. Safety for whom? For you?

A. No; what I, as an engineer, consider as a safe estimate to give out.

Q. Safe for who?

A. Safe for all parties. I think it would be safe for the Water Works Company. If I owned the property I would consider that I was making a very safe estimate of the depreciation in the limits I have given.

Q. You were not considering your own part of that at all?

A. Oh; I have no part in this.

Q. Well, have you named now, all the items of depreciation that you can remember?

A. No; I haven't named them in detail. I simply have told you just how I arrived at it. I presume it would be considerably greater than that if I had time to go into more details and work it out. I simply gave you an approximate off-hand estimate, which I considered a good safe one.

Q. A good safe one?

A. Yes sir.

Q. Well, all right—wait one minute. Did I understand you to say you figured depreciation on the reservoirs?

A. If I were going into details, I would figure that separately.

Q. Have you estimated depreciation on the reservoirs in making this estimate?

A. No sir; I did not.

591 Q. You did not?

A. No; I think it would depreciate more if I went into that.

Q. Then you excluded the reservoirs, and your valuation of a million and a half is simply the machinery, is it?

A. No; I don't think so. I think the machinery and all outside appurtenances, which I could not estimate without time. I could not sit down in a moment's time and give you an estimate on that.

Q. That would be quite a large work, wouldn't it?

A. To give it in detail, yes. I simply have given a rough estimate. There would be little details that would increase possibly and make some variation, but as an approximate estimate, I would give that.

Witness excused.

C. O. LOBECK, a witness on the part of the complainant- is here called and duly sworn. Being examined in chief by Carl C. Wright Esq., he testified as follows:

Q. You may state your full name to the Examiner?

A. C. O. Lobeck.

Q. You may state what official position you occupy in the city of Omaha?

A. City Comptroller.

Mr. WRIGHT: Complainants now offer in evidence a statement prepared by Mr. C. O. Lobeck, the City Comptroller, showing the amount of monies that have been paid out by the city to Daniel W. Mead and John W. Alvord as appraisers.

Witness excused.

The cross examination of this witness as to this record is reserved to the defendant reserving the right to cross examine at a later date if it is desired.

It is hereby stipulated and agreed that the defendant may have until the March rule day to take its testimony, and the complainant may have until the April rule day thereafter for rebuttal.

EXHIBIT 1, C. W. P.

U. S.

to

McCormick.

The United States of America to All to Whom These Presents shall come, Greeting:

Whereas, John McCormick, of Douglas County, Nebraska, has deposited in the General Land Office of the United States, a certificate of the Register of the land office at Omaha, whereby it appears that full payment has been made by the said John McCormick according to the provisions of the act of Congress of the 24th of April, 1820, entitled, "An act making further provision for the sale of the Public lands," for the lots numbered two and

three, of section fourteen in township fifteen, north of range thirteen 13, east, in the district of lands subject to sale at Omaha, Nebraska, containing sixty-six acres and twenty-hundredths of an acre, according to the official plat of the survey of the said lands returned to the general Land Office by the Surveyor General, which said tract has been purchased by the said John McCormick. Now know ye, that the United States of America in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said John McCormick, and to his heirs the said tract above described: To have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said John McCormick and to his heirs and assigns forever.

In testimony whereof, I, James Buchanan, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land office to be hereunto affixed. Given under my hand at the City of Washington the first day of May in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the Eighty-fourth.

By the President:

[SEAL.]

JAMES BUCHANAN,
By J. B. LENORD, *Sec'y.*

J. N. GRANGER,

Recorder of the General Land Office.

Recorded Vol. 2, Page 324. E. Rec'd for record Nov. 28th, 1860,
at 10 A. M.

THE STATE OF NEBRASKA,

County of Douglas, ss:

I, Harry P. Deuel, Register of Deeds, within and for said state and county, do hereby certify that I have compared the above and foregoing with the original records in said office, and that the same is a full, true and correct copy of the record of a patent from the United States of America to John McCormick, as the same appears in Book N., at page 54 of the deed records in the office of said Register of Deeds.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Omaha this 30th day of December, A. D. 1905.

[SEAL.]

HARRY P. DEUEL,
Register of Deeds.

593 (End of Exhibit 1, C. W. P.)

EXHIBIT 2, C. W. P.

To McCormick.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, John McCormick, of Douglas County, Nebraska, has deposited in the General Land Office of the United States, a certificate of the Register of the Land Office at Omaha, whereby it appears that full payment has been made by the said John McCormick according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of Public Lands," for the lot numbered four of section fourteen, in township fifteen north of range thirteen east, in the district of lands subject to sale at Omaha, Nebraska, containing forty-one acres according to the official plat of the survey of said lands returned to the General Land office by the Surveyor General which said tract has been purchased by the said John McCormick. Now know ye, That the United States of America, in consideration of the premises and in conformity with the several Acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said John McCormick, of Douglas County and to his heirs and assigns forever the said tract above described—To Have and to Hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereto belonging unto the said John McCormick and to his heirs and assigns forever. In testimony whereof, I, James Buchanan, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the first day of May in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the eighty-fourth.

Recorded Vol. 2, P. 237. E.

By the President:

JAMES BUCHANAN,
By J. B. LENORD, *Sec'y.*

_____,
Recorder of the General Land Office.

Rec'd for record Nov. 28th, 1860, at 10 A. M.

594 THE STATE OF NEBRASKA,
County of Douglas, ss:

I, Harry P. Deuel, Register of Deeds, within and for said county and state, do hereby certify that I have compared the above and foregoing with the original records in said office, and that the same is a full, true and correct copy of the record of a patent from the United States of America to John McCormick, as the same appears of record in Book N, at page 46, of the deed record in the office of said Register of Deeds.

In testimony whereof I have hereunto set my hand and affixed my official seal at Omaha, this 30th day of December, A. D. 1905.

[SEAL.]

HARRY P. DEUEL,

Register of Deeds.

End of Exhibit 2, C. W. P.

EXHIBIT 3, C. W. P.

John McCormick and Wife

to

D. D. Belden, Mayor of the City of Omaha.

Whereas, I, John McCormick, have this day bid off at the United States Land Office at Omaha, Nebraska, the land and real estate hereinafter described, and now have and hold the legal title thereto, and Whereas, the said land previous to my purchase thereof as aforesaid, and while the same was United States Government Land had been surveyed and platted into lots and blocks, streets and alleys as city property, and whereas, diverse persons claim equitable interest in said tract as City property; Now therefore, know you, that I, John McCormick, of the City of Omaha, County of Douglas and Territory of Nebraska, in consideration of the sum of one hundred dollars to me paid do hereby sell and convey unto David D. Belden, the Mayor of the City of Omaha, in said county, the property and real estate following, to-wit: being within the incorporated limits of the City of Omaha, in the County of Douglas and Territory of Nebraska, and known and described as the west half of the southwest quarter, and lots number one and four of section No. Twenty-three (23) also east half of the Southeast Quarter, and the west half of the southeast quarter and the southeast quarter of the northwest quarter of section No. twenty-two (22), also the east half of the southeast quarter and the west half of the southeast quarter of section No. fifteen (15) also the east half of the southwest quarter and the west half of the Southwest quarter of section No. fifteen, and also Lots number two, three and four in Section No. fourteen (14) all in township number fifteen, North of range number thirteen (13) east of the 6th principal meridian, Nebraska Territory, saving, excepting and reserving from the above described lands that certain portion thereof known as Block "II" of the subdivision of the Park in said City of Omaha. To have and to hold the same with all the appurtenances unto the said David D. Belden, Mayor as aforesaid, in trust however, for the use and benefit of such claimants as aforesaid, and such of said claimants as the city Council of said City of Omaha, or a majority of the members thereof shall decide entitled thereto to be conveyed to such claimants upon the terms and under such rules and regulations as said City Council shall prescribe. But no deed shall be executed by said David D. Belden Mayor and Trustee as aforesaid until after the expiration of fifteen days from the date of these presents. And in all cases where there may be a contest upon the written request of either of the claimants shall be heard

and decided by the said City Council of said City of Omaha, under such rules and regulations as said City Council shall prescribe, and such decision shall be final upon all parties.

And the said David D. Belden, Mayor and Trustee as aforesaid, shall immediately deed all such portions of said tract as has been surveyed and platted into streets and alleys and public grounds to the said City of Omaha in fee simple. And no part of the above described land which has been or may hereafter be sold for delinquent taxes shall be deeded to the claimant thereof until such tax together with fifty per cent interest thereon from the time the same was sold be paid to the said City of Omaha or to the persons entitled to the same. And if at the expiration of six months from the date of these presents any lot or lots or parts of said land shall not be claimed and deeds thereof demanded and payment therefor made as herein provided, all such lots and land shall be absolutely forfeited to the said City of Omaha, and thereupon it shall be the duty of the said David D. Belden, Mayor and Trustee as aforesaid to forthwith deed the same to the said City of Omaha in fee simple to be held nevertheless and to be disposed of at the will of the said City Council, who may at any time in their discretion direct that any one or more of such lots so forfeited be deeded by the City of Omaha to the claimant thereof upon such terms however as said City Council may impose. And I, the said John McCormick, do hereby covenant with the said David D. Belden, Mayor and Trustee as aforesaid, and his assigns that I am seized of said premises in fee simple, and that the same are free from all incumbrance, and that I will warrant and defend the title to the same unto the said David D. Belden, Mayor and Trustee as aforesaid, and to his assigns against the claims of all persons claiming by through or under me, and I, Elizabeth P. McCormick, wife of the said John McCormick, in consideration of one dollar to me paid do hereby release all dower or right of in and to said premises.

In Witness Whereof, we have hereunto set our hands this 5th day of July, A. D. 1859.

JOHN McCORMICK.
ELIZABETH P. McCORMICK.

Signed and delivered in the presence of
JONAS SEELY.
A. J. HANSCOM.

TERRITORY OF NEBRASKA,
Douglas County, ss:

On this 5th day of July, A. D. 1859 at the city of Omaha, in said County, personally appeared John McCormick and Elizabeth McCormick, his wife, before me the undersigned, a Notary Public in and for said County, the said John McCormick and Elizabeth P. McCormick, being personally known to me to be the identical persons described in and whose names are affixed to the foregoing instrument as grantors and each acknowledged the execution thereof to be their voluntary act and deed.

Given under my hand and Notarial seal the day and year afore-
said.

[SEAL.]

JONAS SEELY,
Notary Public, Douglas County, N. T.

Received for record July 5th, 1859 at 5 o'clock P. M.

Attest: of True copy.

THOMAS O'CONNOR, *Reg.*

STATE OF NEBRASKA,
Douglas County, ss:

I, Harry P. Deuel, Register of Deeds, within and for said state and county, do hereby certify that I have compared the above and foregoing with the original records in said office, and that the same is a full, true and correct copy of the record of a deed from John McCormick and wife to D. D. Belden, Mayor, as the same appears in Book L, at page 144 of the deed records in the office of said Register of Deeds.

In Testimony whereof, I have hereunto set my hand and affixed my official seal at Omaha, this 30th day of December, A. D. 1905.

[SEAL.]

HARRY P. DEUEL,
Register of Deeds.

(End of Exhibit 3, C. W. P.)

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EXHIBIT 4, C. W. P.

23.

Henry Bolln (County Treasurer)
to
Charles Corbett.

County Treasurer's Certificate of Tax Sale No. 11.

STATE OF NEBRASKA,
Douglas County, ss:

I, Henry Bolln, Treasurer of the County of Douglas in the State of Nebraska, do hereby certify that the following described real estate in said County and State, to-wit:

Lot 3, Sec. 14, T. 15, R. 13, containing 1 acre, was on the 7th day of November, 1887, duly sold by me at public sale at Co. Treas. Off. Omaha, in the manner provided by law for the delinquent State, Co. & City taxes for the year 1886, thereon amounting to "Eight and 64-100 Dollars, including interest and penalty thereon, and the costs allowed by law to Chas. Corbett, for the said sum of Eight & 64-100 Dollars, he being the highest and best bidder for the same.

And I further certify that unless redemption is made of said real estate in the manner provided by law, the said Chas. Corbett, his heirs or assigns, will be entitled to a deed therefor, on and after

the 8th day of November, A. D. 1889, on surrender of this certificate.

In Witness Whereof, I have hereunto set my hand this 7th day of November, A. D. 1887.

HENRY BOLLN, *Treasurer.*

STATE OF NEBRASKA,
Douglas County, ss:

D. C. Dunbar, being duly sworn, deposes and says that he is manager of the Omaha Weekly Republican, a newspaper printed at Omaha, in the said County of Douglas, that the printed notice hereto attached was, of his personal knowledge, published in the said weekly newspaper three successive weeks, July 4-11-18-1889, next after and including the 4th day of July, A. D. 1889.

The said newspaper was, during that time, in general circulation in the County of Douglas and State of Nebraska.

(Signed)

D. C. DUNBAR, *Manager.*

Sworn to and subscribed in my presence before me this 29th day of July, 1889.

[NOTARIAL SEAL.]

WARNER L. WELSH,
Notary Public.

598	Printer's fees.....	\$3.00
	Affidavit	\$.25
		<hr/>
		\$3.25

Paid by ———.

Notice to Redeem from Tax Sale.

To Margaret Love:

You are hereby notified that Charles Corbett, purchased of the treasurer of Douglas County, Nebraska, at public sale for delinquent taxes lot 3, in section 14, township 15, range 13, Douglas County, Nebraska, on the 7th day of November, 1887; that said lot was taxed in the name of Margaret Love for the year 1886, and that the time for redemption will expire on the 8th day of November, 1889.

Dated, Omaha, Nebraska, June 20, 1889.

CHARLES CORBETT,

By his Attorney, B. G. BURBANK.

J'y 4-11-18.

County Treasurer's Certificate of Tax Sale No. 12

STATE OF NEBRASKA,
Douglas County, ss:

I, Henry Bolln, Treasurer of the County of Douglas in the State of Nebraska, do hereby certify that the following described real estate, in said county and state, to-wit:

Lot 4, Sec. 14, T. 15, R. 13, containing 1 acre, was on the 7th day of November, 1887, duly sold by me at public sale at Co. Treas. office in the manner provided by law for the delinquent State, Co., & City taxes, for the year 1886, thereon amounting to Eight & 65-100 Dollars, including interest and penalty thereon, and the costs allowed by law to Chas. Corbett for the said sum of Eight and 65-100 Dollars, he being the highest and best bidder for the same. And I further certify that unless redemption is made of said real estate, in the manner provided by law, the said Chas. Corbett, his heirs or assigns, will be entitled to a deed therefor on and after the 8th day of November, A. D. 1889, on surrender of this certificate.

In Witness Whereof, I have hereunto set my hand this 7th day of November, A. D. 1887.

HENRY BOLLN, *Treasurer.*

STATE OF NEBRASKA,

Douglas County, ss:

D. C. Dunbar, being duly sworn, deposes and says, that he is Manager of the Omaha Weekly Republican, a newspaper printed at Omaha, in the said county of Douglas, that the printed notice hereto attached was, of his personal knowledge published in the said Weekly Newspaper three successive weeks July 4-11-18-1889 next after and including the Fourth day of July, A. D. 1889.

The said newspaper was, during that time, in general circulation in the County of Douglas and State of Nebraska.

(Signed)

D. C. DUNBAR, *Manager.*

Sworn to and subscribed in my presence before me this 29th day of July, 1889.

[NOTARIAL SEAL.]

WARNER L. WELSH,

Notary Public.

Printer's fees.....	\$3.00
Affidavit	\$.25

\$3.25

Paid by ———.

Notice to Redeem from Tax Sale.

To J. Smaughlin: You are hereby notified that Charles Corbett purchased of the treasurer of Douglas County, Nebraska, at public sale for delinquent taxes lot 4 in section 14, township 15, range 13, Douglas County, Nebraska, on the 7th day of November, 1887, said lot was taxed in the name of J. Smaughlin for the year 1886 and the time for redemption will expire on the 8th day of November, 1889.

Dated, Omaha, Neb., June 20th, 1889.

CHARLES CORBETT,

By His Attorney, B. G. BURBANK.

J'y 4-11-18.

STATE OF NEBRASKA,
Douglas County:

Whereas, at a public sale of real estate for the nonpayment of taxes, made in the county aforesaid, on the 7th day of November, A. D. 1889, the following described real estate was sold to-wit:

Tax Lots Three (3) and Four (4) in Section Fourteen (14) Township Fifteen (15) Range Thirteen (13) Each lot containing one (1) acre respectively.

And whereas, the same not having been redeemed from such sale, and is appearing that the holder of the certificate of purchase of said Real estate has complied with the laws of the State of Nebraska, necessary to entitle him to a deed of said Real Estate.

600 Now, Therefore, Know Ye, that I, Henry Bolln, County Treasurer of said County of Douglas, in consideration of the premises, and by virtue of the statutes of the State of Nebraska in such cases provided, do hereby grant and convey unto Charles Corbett, his heirs and assigns forever, the said Real Estate hereinbefore described, subject, however, to any redemption provided by law.

Given under my hand and the Seal of our Court this 8th day of November, A. D. 1889.

[Official Seal County Treasurer, Douglas County, Nebraska.]

HENRY BOLLN,
County Treasurer.

T. A. MEGEATH,
Register of Deeds.

Entered on Numerical Index and recorded Dec. 27th, 1889, at 3:45 o'clock P. M.

STATE OF NEBRASKA,
County of Douglas, ss:

I, Harry P. Deuel, Register of Deeds, within and for said County and state, do hereby certify that I have compared the above and foregoing with the original records in said office, and that the same is a full, true and correct copy of the record of a deed from Henry Bolln, County Treasurer, to Charles Corbett, as the same appears in Book 135, at page 39, of the Deed records in the office of said Register of Deeds.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Omaha, this 2nd day of January, A. D. 1906.

[SEAL.]

HARRY P. DEUEL,
Register of Deeds.

End of Exhibit 4, C. W. P.

EXHIBIT 5, C. W. P.

26.

Charles Corbett and wife
to
Byron G. Burbank.

Know all Men by These Presents, That Charles Corbett and Editha H. Corbett his wife, in consideration of one . . /100 Dollars in hand paid, do hereby Grant, Sell, Remise, Release and forever quit claim unto Byron G. Burbank, an undivided one-half interest in the following described Real Estate, situate in the County of Douglas and State of Nebraska, to-wit:

Lot four (4) in block four hundred forty-eight (448) also 601 lot four (4) in block four hundred thirty eight (438) also lot six (6) in block four hundred sixty-seven (467) in Grandview, in the City of Omaha. Also the South one-half ($\frac{1}{2}$) of lot nineteen (19) in block eighteen (18) in Hanscom Place, in the City of Omaha. Also the South Sixteen (16) feet of lot five (5) in block one hundred eighty-seven and one-half ($187\frac{1}{2}$) in the City of Omaha. Also Tax Lot No. three (3) in Section fourteen (14) in township fifteen (15) range (13) containing one (1) acre. Also Tax Lot No. four (4) in section fourteen (14) in township fifteen (15) range thirteen (13) containing one (1) acre. All in the City of Omaha.

Together with all the tenements, hereditaments and appurtenances to the same belonging, and all the estate, right, title, interest, dower, claim or demand whatsoever of the said Charles Corbett and Editha H. Corbett, his wife, of, in and to the same or any part thereof. To Have and to Hold the above described premises with the appurtenances, unto the said Byron G. Burbank, and to his heirs and assigns forever.

Signed this tenth day of November, A. D. one thousand eight hundred and eighty-nine.

CHARLES CORBETT.
EDITHA H. CORBETT,
By CHAS. CORBETT,
Her Att'y in Fact.

In presence of:

JOHN E. EDWARDS.

THE STATE OF NEBRASKA,
Douglas County, ss:

On this 27 day of December, A. D. 1889, before me, a Notary Public in and for said county, personally came the above named Charles Corbett, for himself and as att'y in fact for Editha H. Corbett, who is personally known to me to be the identical person, whose name is affixed to the above deed as grantor, and he acknowledged the instrument to be his voluntary act and deed, and the voluntary act and deed of Edith H. Corbett, his principal.

Witness my hand and Notarial Seal the date aforesaid.

[SEAL.]

JOHN E. EDWARDS,
Notary Public.

Entered on Numerical Index, and recorded Dec. 27th, 1889, at 3:50 o'clock P. M.

T. A. MEGEATH,
Register of Deeds.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, Harry P. Deuel, Register of Deeds, within and for said
602 County and State, do hereby certify that I have compared the above and foregoing with the original records in said office, and that the same is a full, true and correct copy of the record of a deed given by Charles Corbett and wife to Byron G. Burbank, as the same appears of record in Book 135 at page 47, of the Deed records in the office of said Register of Deeds.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Omaha, this 2nd day of January, A. D. 1906.

[SEAL.]

HARRY P. DEUEL,
Register of Deeds.

(End of Exhibit 5, C. W. P.)

5

EXHIBIT 6, C. W. P.

Charles Corbett et ux.
to
Cynthia A. Ratekin.

This Indenture made this Twenty-seventh day of December in the year one thousand eight hundred and eighty-nine between Charles Corbett and Edith H. Corbett, husband and wife of the first part, and Cynthia A. Ratekin of the second part,

Witnesseth: That the said parties of the first part, in consideration of the sum of One (1) Dollars to them duly paid, the receipt whereof is hereby acknowledged, have remised, released and quit claimed, and by these presents do for themselves, their heirs, executors and administrators, remise, release and forever quit claim unto the said party of the second part and to her heirs and assigns forever, all their right, title, interest, estate, dower claim and demand both at law and in equity of, in and to the following described Real Estate situated in Douglas County and State of Nebraska:

The undivided one-half of Government Lots Three (3) and Four (4) in section fourteen (14) Township fifteen (15) Range Thirteen (13); the south sixteen (16) feet of Lot Five (5) in Block one hundred and eighty-seven and one-half (187½) in the City of Omaha as originally platted and lithographed; Lot one (1) in block forty-one (41) in "Credit Foncier," an addition to the City of Omaha, and also the undivided one-half of lots ten (10) in Block

Four Hundred and Thirty (430), Lots Three (3), Nine (9), Ten (10), and Eleven (11) in Block Four Hundred and Thirty-three (433) Lots One (1), Two (2), Three (3), Four (4), Ten (10) and Eleven (11) in Block Four Hundred and Thirty-eight (438)

Lot Four (4) in Block Four Hundred and Forty-eight 603 (448) and lot six (6) in Block Four Hundred and Sixty-seven (467) all in "Grandview," an addition to Omaha, as surveyed, platted and recorded.

Together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above described premises unto the said Cynthia A. Ratekin, her heirs and assigns so that neither they the said Charles and Editha H. Corbett or any person in their name or behalf shall or will hereafter claim or demand any right or title to the said premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHARLES CORBETT.
EDITHA H. CORBETT.

Signed, sealed and delivered in presence of:

JOHN E. EDWARDS.

THE STATE OF NEBRASKA,
Douglas County, ss:

On this 27th day of December, A. D. 1889, before me, the subscriber, a Notary Public, duly appointed, commissioned and qualified for and residing in said county, personally appeared Charles Corbett and Editha H. Corbett, to me known to be the identical persons described in and whose names are affixed to the foregoing conveyance as grantors and they acknowledged said instrument to be their voluntary act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal at Omaha in said County, the day and year last above written.

[NOTARIAL SEAL.]

JOHN E. EDWARDS,
Notary Public.

Entered in Numerical Index and recorded Mar. 27th, A. D. 1893, at 9:50 o'clock A. M.

T. A. MEGEATH,
Register of Deeds.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, Harry P. Deuel, Register of Deeds, within and for said County and State, do hereby certify that I have compared the above and foregoing with the original records in said office, and that the same

is a full, true and correct copy of the record of a deed given
604 by Charles Corbett and wife to Cynthia A. Ratekin, as the
same appears in Book 173, at page 234 of the Deed record
in the office of said Register of Deeds.

In Testimony Whereof, I have hereunto set my hand and affixed
my official seal at Omaha, this 2nd day of January, A. D. 1906.

[SEAL.]

HARRY P. DEUEL,
Register of Deeds.

End of Exhibit 6, C. W. P.

EXHIBIT No. 7, C. W. P.

327—*Warranty Deed.*

Omaha Republican Print.

Known All Men By These Presents: That Victor G. Lantry of
the County of Douglas and State of Nebraska, for and in consid-
eration of the sum of thirty-six hundred and seventy-five dollars
in hand paid, do hereby grant, bargain, sell, convey and confirm
unto Frederick H. Mills, of the County of — of Boston, Mass.
the following described real estate, situated in Florence in Douglas
County, and State of Nebraska, as lithographed and recorded and
there numbered Block 9.

Lot 5, Block 1	
" 4, "	39
" 5, "	38
" 7, "	38
" 8, "	38
" 6, "	38
" 7, "	29
" 2, "	18
" 6, "	19
" 8, "	49
" 6, "	29
S. ½ " 4, "	51

and except S. ½ Lot 4, Blk. 51, I do hereby covenant with the said
grantee and heirs and assigns that I am lawfully seized of said prem-
ises; that they are free from incumbrance; that — have good right
and lawful authority to sell the same; and I do hereby covenant to
warrant and defend the title to said premises against the lawful
claims of all persons whomsoever, except 1888 taxes.

And the said Mary M. Lantry, wife of this grantor hereby re-
linquishes all claims to right of dower in and to the above described
premises.

605 Signed this 22nd day of November, A. D. 1888.

VICTOR G. LANTRY.
MARY M. LANTRY.

In presence of:
J. H. BLAIR.

THE STATE OF NEBRASKA,
Douglas County, ss:

On this 22nd day of November, A. D. 1888, before me Joseph H. Blair, a Notary Public in and for said county, personally came Victor G. Lantry and his wife, Mary M. Lantry, to me personally known to be the identical persons whose names are affixed to the above instrument as grantors, and severally acknowledged the execution of the same to be their voluntary act and deed for the purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal at Omaha, on the day last above written.

[SEAL.]

JOSEPH H. BLAIR,
Notary Public, Douglas County, Nebraska.

Said Exhibit bears the following endorsement on the back thereof:

(In lead pencil:) 3. Flor. C. H. Venner, 33 Wall St. N. Y. City.

(In rubber stamp:) G. Mail.

(In printing and writing:)

327. Warranty deed, from Victor G. Lantry & wife, to Frederick H. Mills. Dated —, 188—, Sec. —, Tp. —, N. of R. —, E. —.

STATE OF NEBRASKA,
Douglas County, ss:

I hereby certify that this instrument was entered on Numerical Index, and filed for record this 6th day of October, 1892 at 10:10 o'clock, A. M., and recorded in Book No. 167 of Deeds, at page 354.

T. A. MEGEATH,
Register of Deeds,
By M. H. HOERNER, Deputy.

11.10 Fees. \$1.15.

Compared.

Omaha Republican Print.

EXHIBIT No. 8.

Know all men by these presents: That Frederick H. Mills and Clara H. Mills, his wife, of Boston, Mass., in consideration of one dollar, in hand paid, and other good and valuable considerations do hereby grant, sell, remise, release and forever quit claim unto Delos A. Chappell, the following described real estate, situate in the County of Douglas and State of Nebraska, to-wit:

Block nine (9) lot five (5) block one (1), lot four (4) block thirty-nine (39) lots five (5) six (6) seven (7) and eight (8) in block thirty-eight (38) lots six (6) and seven (7) in Block twenty-nine (29) lot two (2) in block eighteen (18) lot six (6) block nineteen (19) lot eight (8) block forty-nine (49) and the south half (S. ½) of lot four (4) in block fifty-one (51) according to the plat

of Florence, Douglas County, Nebraska, as lithographed and recorded, and all said property being situated in said Florence.

Together with all the tenements, hereditaments and appurtenances to the same belonging, and all the estate, right, title, interest, dower claim or demand whatsoever of the said Frederick H. Mills and Clara H. Mills, his wife, of, in and to the same or any part thereof.

To have and to hold the above described premises, with the appurtenances, unto the said Delos A. Chappell, his heirs, successors and assigns forever.

And the — Frederick H. Mills doth covenant that he hath not done, suffered or committed and will not do, suffer or commit any act or acts whereby the title hereby conveyed is or may be in any way impeached or impaired.

Signed this 21st day of September, A. D. one thousand eight hundred and ninety-two.

[SEAL.]

[SEAL.]

FREDERICK H. MILLS.

CLARA H. MILLS.

In presence of:

CHAS. HALL ADAMS.

STATE OF MASSACHUSETTS,

County of Suffolk, ss:

On this twenty first day of September A. D. 1892, before me Charles Hall Adams, a Commissioner of the State of Nebraska, resident in the State of Massachusetts, also a Notary Public of said State of Massachusetts, personally appeared Frederick H. Mills and Clara H. Mills, his wife, to me personally known to be the identical persons described in and whose names are affixed to the within conveyances as grantors and severally acknowledged the same to be their

voluntary act and deed.

607 In witness whereof, I have hereunto set my hand and official seals at Boston, in the County aforesaid, the day and year in this certificate aforesaid.

[SEAL.]

CHAS. HALL ADAMS.

Commissioner for the State of Nebraska,

Also Notary Public.

(Commissioner.)

[SEAL.]

(Notary.)

Said Exhibit bears the following endorsements on the back thereof:

(In lead pencil:) 4. Florence, C. H. Venner, N. Y. City.

(In rubber stamp:) G. N. Mail.

(In writing:) Quit Claim Deed. Frederick H. Mills, & W. to Delos A. Chappell.

THE STATE OF NEBRASKA,
Douglas County, ss:

Entered on Numerical Index and filed for record in the Register of Deeds office of said County, the 6th day of Oct. 1892, at 11:10 o'clock A. M., and recorded in Book 167 of deeds, page 355.

T. A. MEGEATH,

Register of Deeds,

By M. H. HOERNER, *Deputy.*

11.10

Compared.

1.15

EXHIBIT No. 9.

OMAHA, NEB., Dec. 29, 1905.

This is to certify that the amounts hereinafter named are the total sums of money paid to date by the City of Omaha to Daniel W. Mead and John W. Alvord, for services rendered in the negotiation relative to the purchase of the Omaha Water Works by the City of Omaha.

Daniel W. Mead.

To date.

\$1,596.86.

There is also an approved bill of \$300.19 due Mr. Mead which is ready for payment.

John W. Alvord.

Paid to date.

\$2,735.70.

There is also a bill for \$1,163.35 due Mr. Alvord which has been properly approved and is ready for payment.

608 This statement is correct according to the books in my office.

(Signed)
 [SEAL.]

C. O. LOBECK,
City Comptroller.

DISTRICT OF NEBRASKA, ss:

I, Charles W. Pearsall, Examiner, hereby certify that the foregoing testimony in the above entitled cause was taken before me at the times and places in the record thereof indicated; that before testifying each of the several witnesses was by me severally duly sworn to tell the truth, the whole truth and nothing but the truth; that said testimony was taken in shorthand by myself, and by myself transcribed as hereinbefore set forth; that by agreement of parties the signature of each of said witnesses to their respective depositions, so extended, was waived.

CHARLES W. PEARSALL, *Examiner.*

Endorsed: Filed Feb. 3, 1906. Geo. H. Thummel, Clerk.

Thereupon afterwards, to-wit: — There was offered in evidence in the case of the Omaha Water Company vs. The City of Omaha, No. 74 Docket "X," the testimony taken in the case of the Water Board of the City of Omaha, vs. Daniel W. Mead, et al. No. 209 Docket "W," filed in said cause on the 16th day of June, 1906, to-wit: The testimony of Alonzo B. Hunt, together with exhibits offered, testimony of E. M. Fairfield, together with exhibits offered, testimony of W. A. Underwood, testimony of Captain Frank Reynolds, testimony of Wilbur F. Hawes, together with exhibits offered, testimony of F. H. Marshall, together with exhibits offered, testimony of Captain Edward Ruger, together with exhibits offered, which said testimony and exhibits are in words and figures following, to-wit:

ALONZO B. HUNT is here called and duly sworn as a witness on the part of the defendants. Being examined in chief by Mr. R. S. Hall, he testified as follows:

Q. Mr. Hunt, what position do you occupy with reference to the Omaha Water Company?

A. I am superintendent of the Omaha Water Company.

Q. How long have you been connected with the Omaha Water Company and the water works here in the city, and under what circumstances?

A. Since 1880.

Q. What positions did you occupy during that time, and with what companies?

A. I have been superintendent all of the time, and I was 609 one of the receivers part of the time, and I was temporary receiver alone part of the time.

Q. With what companies were you employed?

A. Employed first for the City Water Works Company, next for the Illinois Company, I think it was called, and——

Q. That is the American Water Works Company of Illinois?

A. Yes—and then the Omaha Water Company.

Q. Were you employed by the American Water Works Company of New Jersey?

A. Yes sir, I was employed with that company.

Q. Well, they were the ones that succeeded the American Water Works Company of Illinois, I believe?

A. Yes sir.

Q. At the time the water works were built, or the contract was made rather for the water works in 1880, was there any town in South Omaha at that time?

A. No sir, there was not.

Q. Do you remember when the stock yards company first went to South Omaha?

A. I should think it was about 1885, somewhere along there—1884 maybe—I don't know exactly.

Q. Might it have been in 1883?

A. It might have been, yes sir.

Q. Well, it was, as a matter of fact. Now I show you this map

marked exhibit 5 and ask you whether it correctly shows the pipe system of the Omaha Water Company in Omaha and South Omaha?

A. Yes, sir, it shows the pipe and hydrants.

Q. I am calling your attention to the date of the map, as being 1903, whether it correctly shows it at that time?

A. Yes sir, it does.

Q. What changes have been made, if any?

Mr. FAIRFIELD: It doesn't show the hydrants, not all of them.

Mr. HUNT: Not all of them, but it shows pipe and hydrants.

Q. Is the system substantially the same now?

A. Yes sir, substantially it is.

Q. What changes have been made in it?

A. Well, there have been some extensions of pipe lines.

Q. And new hydrants added?

A. New pipe lines and new hydrants and valves, yes.

Mr. HALL: I now offer in evidence the map referred to, marked Exhibit 5.

Map marked Exhibit 5 is received without objection.

Q. Mr. Hunt, I notice on this map a line marked "City Limits," what does that line indicate?

610 A. That indicates the line where South Omaha and Omaha separate.

Q. Now you may state what the fact is as to whether that boundary line was ever in dispute?

A. Yes, sir, it was—the boundary line used to be further north—

Q. You mean it used to be supposed to be further north?

A. Yes sir.

Mr. FAIRFIELD: You mean further south?

Mr. HUNT: Well, whichever it was.

Q. And was that settled by litigation?

A. I don't remember just how it was settled—yes, I believe it was settled by litigation.

Q. Now this line between Omaha and South Omaha is not marked any way on the surface of the ground, but it is simply an imaginary line that divides them, is that right?

A. Yes.

Q. At the time the City of South Omaha was laid off you may state whether the Omaha Water Company's lines, the lines of the Omaha Water Company's mains had been located over the border line?

A. The border line of what is now South Omaha?

Q. Of what is now South Omaha.

A. Yes, it had. Three or four places I remember. 13th Street I remember was one place we had gone over quite a ways, and 20th street was another.

Q. And how did that happen?

A. Well, there was no definite line, no definite division between South Omaha and Omaha, that is nothing that was known as a definite line—for instance we went over into a precinct called Clon-

tarf and we thought that it was the city, but it was only a precinct of the county. It wasn't the city of Omaha.

Q. Is that marked on this map?

A. Yes, it is.

Mr. WRIGHT: It isn't in either city?

Mr. HUNT: No.

Q. That is correctly located there?

A. Yes sir.

Q. That is in neither city?

A. No sir.

Q. Those were mistakes made by the City of Omaha as well as by the Company weren't they

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness.

611 A. We were ordered to lay pipes and place hydrants in that precinct. We were ordered to place hydrants 400, 800 and 1200 feet along there, which ran way over this Clontarf precinct line.

Mr. WRIGHT: We move to strike out the answer of the witness as stating a conclusion, as not being responsive to the question, and as not being the best evidence.

Q. And the same way with reference to 20th street?

A. Yes sir.

Q. And with reference to 13th Street was it the same way?

A. Yes sir, with reference to 13th Street also.

Mr. WRIGHT: We move to strike out the answer of the witness as stating a conclusion, as not being responsive to the question, and as not being the best evidence.

Q. You may state then how South Omaha grew up from 1880?

A. There was a farm out there in 1880—farm land out there. It was all farm land out there, out south of—well, say south of what is now Boulevard street, was farm land. After the stock yards company built up there, started the stock yards and the packing houses, then the city of South Omaha commenced to build, and the two cities kept building, both of them, out that way, until this controversy came up as to where the line was between them. Finally that was settled and they still kept building until now they are practically one city, as far as houses and streets are concerned. There are paved streets running right through now continuously from Omaha to South Omaha.

Q. Mr. Hunt, I call your attention to this blue-print which is marked by the reporter Exhibit 6, and which purports to show the land of the Omaha Water Company at the Burt street basin, at Burt Street. You may state, Mr. Hunt, whether you know the location there and have been acquainted with it, and if so for how long?

A. I have been acquainted with it and know the location ever since 1880, and have worked on the ground. The first work the Water Company did, was to lay out these grounds—

Q. You may state how long the Water Company had been in

possession of these grounds? Calling your attention now to the ground enclosed in the red line.

Mr. WRIGHT: That is objected to as immaterial and as calling for a conclusion of the witness.

A. They have been in possession of it ever since 1880.

Q. How long has it been fenced?

A. It was fenced the first time—well it was in 1886 it
612 was fenced first—the first we enclosed it, and it has been enclosed ever since.

Q. I notice a red line along the river bank. There is no fence there is there?

A. No sir, that is a riprap along there.

Q. Has the company been in the exclusive possession of that ground during that time?

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness, and as not being the best evidence.

A. Yes sir, all that within the red line.

Q. Has anybody else been inside the fence except the company during that time. I mean, in possession of the ground in any way.

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness, and as not being the best evidence.

A. No sir.

Q. During that time you may state what the Company's possession has been, as to its ownership of that property, whether or not it claimed to own it?

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness, and as not being the best evidence.

A. We have owned it, yes sir.

Mr. WRIGHT: We move to strike out the answer of the witness for the reason that it merely states a conclusion of the witness, and is not the best evidence, and as not being responsive to the question.

Q. There are some basins here north of the red line are there not Mr. Hunt?

A. There is one basin.

Q. That the Company does not claim, to own, does it?

A. No, we lease that. There is also a basin south that we built there, and leased—but dropped the lease from that some time ago.

Q. From this river bank are there any accretions making out east filling up there at all?

A. Yes, we made considerable there by accretion.

Q. Does that show on this map—about how far out does that go?

A. It is an irregular line runs out at this northeast corner of this red line—runs out four or five hundred feet, the accretions do, right there at the other—

Q. What other—

A. Runs out at the old auction, down at the southeast corner—it runs out to a point—runs to nothing.

613 Q. How has the north part of this property been occupied by the Company—just describe the nature of its occupancy?

A. Been occupied by basins, basins filled with water.

Q. And what does this represent, this in white?

A. That represents the location of the different buildings, the boiler house, coal sheds and the brick building that the pumps are in—the first and original station that was built for the pumping of water for the City of Omaha, with additional buildings added to it.

Q. How is the rest of the ground occupied there, Mr. Hunt?

A. All that is not covered by the basins is occupied as a storage yard—This portion we will say (indicating)—the north portion, all that is unoccupied by basins is storage space for "T's", crosses, valves, sleeves and things of that kind. Then all of the south portion from the south line of the pumping station is occupied by pipe yards, for different size of pipe.

Q. The Union Pacific right of way—

A. (Interrupting.) When we were constructing, that whole ground was occupied as a pipe yard. We carried all our pipe piled up on that portion. The west portion of this, and south of the basin—west of the pumping station and south of the basin is occupied for storing valve boxes and meter boxes and supplies of that kind—and lumber used for bracing.

Q. How long has that occupancy, in the way you have described it, continued, Mr. Hunt?

A. It has always been occupied in very nearly that form as I have described it.

Q. Since what time.

A. Since 1880—always been our store yard. We have a track in there and our pipe is unloaded there first. Every foot of pipe laid in Omaha is switched in there and unloaded there, inspected there and started from there.

Q. How many men do you keep there at that station—or does the company keep?

A. We have a watchman and we have a fireman. They vary from four to six—fireman and a couple of wipers for night and a couple of wipers for—a wiper and oiler I should say—night force and day force—we have three engineers in the day time and two at night—I should say engineer and assistant engineer.

Q. What is the duty of the watchman there?

A. The duty of the watchman is to be on the basins, on the outside. He watches the basins to see that people don't go in there and throw anything in, keeps the fence up and prevents people coming in there and cutting the wire and fishing or throwing anything into the basins, and keeps the weeds off.

614 Q. How long has the watchman been in there in control, as you have stated?

A. We never put a watchman on until the time that the American Water Works took hold of it in 1886. When Wiley went in there he insisted on having a watchman.

Q. Since 1886 a man has been there continuously?

A. Yes, sir, been there continuously.

Q. Performing such duties as you name?

A. Yes sir.

Q. I don't know whether I asked you—but does this red line on the blue print—excepting the red line which marks the bank of the river—does that red line correctly represent the fence that has been there since 1880?

A. Yes sir—1886.

Q. Since 1886?

A. Yes sir.

Mr. HALL: I will now offer in evidence this map marked Exhibit 6.

Mr. WRIGHT: That is objected to as immaterial and incompetent. Map referred to is herewith presented.

Q. Mr. Hunt, you were with the Company when they laid out the basin at Florence, and participated in that work out there?

A. Yes sir.

Q. I call your attention now to the track shown on this old map of Florence, which I will have the reporter mark Exhibit 7. Down near the river here there appears on this map a track marked "proposed new track", and "old track" of the Chicago, St. Paul, Minneapolis and Omaha road. Do you see what I mean?

A. Yes, I see.

Q. Now you may state what the fact is in respect to that track and right of way?

A. That track is the nearest to the basins now——

Q. From what point do you speak of when you say "nearest the basin"?

A. Well, that was a track that ran along on the east side of our basins at the time we first bought the property and started to work at it at Florence, which I think was in 1886 or 1887, but there is no track there now.

Q. What happened to it. State what happened to that track and the ground on which it stood.

A. The track—after we were out there a while—we were working there, and during the construction of the plant the river commenced to cut in on the west side of the river in front of our property and it cut away—it did cut in and undermine this track from a point—I don't know how to designate that—north of Jackson street, we will say. North of Jackson street—say 200 feet north of Jackson street to a point near the alley in block 38. The track went into the river and a part of it floated down and was taken out. Later on the river kept cutting in and threatening to undermine our basins—1 and 2 particularly.

Q. You may state, if you will, Mr. Hunt, whether the river washed in so as to wash into our land clear of their right of way, whatever it was?

A. It did.

Q. From what point? From these two points you have named?

A. Not quite so far north nor quite so far south as I have just described.

Q. You may state the points within which the river washed out entirely the railroad right of way.

[Q.] Well, it did wash the railroad right of way out between these two points I gave you first.

Q. That is from 200 feet north of Jackson street to the middle of the alley in block 38?

A. Yes sir.

Q. Then what was done by the company?

A. The company then commenced to put in stone and cribs—not only in front of this portion where it was washing, but they went further up the river and put in cribs in order to turn the current to prevent the full force from striking and cutting in further at the point opposite our basins.

Q. You may state, Mr. Hunt, whether by means of this stone work or not, they recovered the land formerly covered by the right of way of the road?

A. We did. We recovered that and then more than that. We drove the river out further, crowded it out by means of putting in brush cribs and stone riprap, forced it out further than it was formerly when I first went up the river to examine it before we started work.

Q. Now, Mr. Hunt. I call your attention to the ground occupied by the Omaha Water Company in Florence. Do you know where block 9 is in Florence?

A. Yes sir.

Q. You may state, Mr. Hunt, what the fact is with reference to the occupancy of Block 9 by the Omaha Water Company?

A. It is occupied by them.

Q. How long has it been occupied by the Omaha Water Company?

A. Ever since we started work in 1886 or 1887.

Q. Has it been occupied at any time by the railroad company?

A. Their track crossed it when we first went to occupying it.

Q. How long has it been since the railroad company has been on that block?

616 A. I don't know how long it was there before we went there, but it was there when we went there.

Q. How long has it been since the railroad was on that block?

A. There is a railroad on that block to-day—our switches.

Q. Well, but the railroad Company I mean. How long is it since they occupied it in any way?

A. They haven't occupied it since quite a while before it washed out. It became dangerous—that is before the track was washed out entirely.

Q. After this road was washed out as you have detailed what did the railroad company do with respect to providing a new line?

A. Before it washed out they provided a new line on the west side of our basin which is there, and they are running on it now.

Q. How long has it been since they used block 9 for their line in any way?

A. They ran a train over it up to about 5 years ago, ran a train over it once a year up to that time. At that time I objected to their

running over our ground and tore a part of the track up and put a barricade on it.

Q. How far did they run down with their train, they couldn't run down where this track was out?

A. We replaced that track ourselves.

Q. Well, did you replace the track on block 9?

A. Yes and all through that—replaced the whole thing in order to put our riprap in.

Q. I understand with respect to that, but how was it with respect to block 9, was that all built out after this high water?

A. Yes, that was all built out.

Q. The Company built all this out the same as the other that you have spoken about?

A. All except one corner that wasn't washed out. Yes sir, we built it out just the same as the other with stone and brush, by means of stone and brush.

Q. I call your attention now, Mr. Hunt to lot 5, block 1?

A. Yes, that is just east of our—northeast of our pump house.

Q. Whose switch is that on there—is there any switch on there now?

A. Not where those dotted lines are.

Q. There is no railroad line on that lot at all is there?

A. No sir.

Q. The Omaha Water Company has had exclusive possession of that then, for how long?

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness:

617 A. There never was a track there. They have had possession of it all the time. There was a proposed track which never was put down.

Q. You may state what was the nature of the possession of the Water Company, of that lot, what they did with it, what they used it for.

A. They graded it off and used it for their pipe to run over for suction from the river, graded it and seeded it down.

Q. Plant any trees on it?

A. No, didn't plant any trees on that portion.

Mr. WRIGHT: Is there any pipe running over it?

A. Yes, there is a pipe runs there on it, or very close, on lot 5.

Q. I call your attention now to lot 4, block 39. You may state whether or not that lot is within the fence of the Water Company?

A. It is.

Q. How long has it been fenced up by the Water Company?

A. Ever since our works were completed there. The fence was put around shortly before the works were completed.

Q. What year was that?

A. I don't remember what year the works were completed.

Q. Well approximately.

A. We were there about four years building—about '90 I should think. At all events the fence was put around before the works were opened, before we had our opening, before they were completed.

Q. Calling your attention now to lots 5-6-7 and 8 in block 29, you may state whether those lots are within the fence of the Omaha Water Company?

A. They are.

Q. How long has the fence been built there?

A. Since before the works were completed.

Q. Well, what year now—somewhere so that I know some length of time?

A. About 1890.

Q. How have they been used by the Water Company?

A. Well, the basin is built on a part of 5 and 6—5 and 7—that is 5 and 8—5 and 8, that's right.

Q. In what way, Mr. Hunt, has the Omaha Water Company controlled this property within its fence?

A. Why we use it and control it the same as we do all our property. Use it as our property—whatever we want to use it for. In that case it is a part of the basin.

Q. In respect to these four lots?

A. Yes, 6 and 7 are a part of the embankment.

Q. I call your attention now, Mr. Hunt, to lots 6 and 7 in block 29, are those lots within the fence of the Water Company?

A. Part of them.

Q. Aren't they all?

A. Yes, they are all in.

618 Q. Where does the fence of the Water Company run then?
Mr. Hunt—where lots 6 and 7 are?

A. It runs on the—runs along there close to the west line of this block of these lots 6 and 7—

Q. You may state whether or not it runs right along the right of way of the Railroad Company?

A. Yes it does. It runs right up flush to that.

Q. And includes lots 6 and 7 within its boundaries, doesn't it?

A. Yes, part of the embankment is on 6 and 7 in block 29.

Q. I call your attention now to lot 2 in block 18, Mr. Hunt. You may state what possession the Company has had of block 18?

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness.

A. They have had entire possession of it.

Q. How have they used lot 2 in block 18?

A. Part of it was used—lies within the basin, part of it within the embankment, and a part of it on our pipe line right of way.

Q. You may state, Mr. Hunt, how long these basins have been built there on that ground, and what purposes they are used for?

A. The basins were started in '87, I think, and have been in use ever since. They are used for settling water—purifying water.

Q. How are they constructed?

A. They are constructed by excavating the ground and putting in a stone foundation around the outside of them—a wall—and they are lined with heavy artificial stone.

Q. How deep are they?

A. They vary from 28 to 32 or 33 feet.

Q. I call your attention now to lot 6 in Block 19, Mr. Hunt, and you may state where that is situated?

A. Our basin 2 is built—it is a part of our basin 2, lot 6 is.

Q. Is it within the fence of the Water Company?

A. Yes sir.

Q. You may state if you can, if you know, where the fence of the Omaha Water Company runs. Giving its boundaries on that map.

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness.

A. It runs—for the west side it takes the right of way of the Chicago, St. Paul, Minneapolis and Omaha Railway, and on the east side—and on the south it takes the north line of Washington street, and on the east side the river is our boundary line—the Missouri River. On the north side of the grounds—of the Water Company's grounds it is a meandering line that I can't describe by streets, but it is bounded in the greater part by Mill Creek.

Mr. WRIGHT: Well, that is not the fence, he is asking you about the fence.

The WITNESS: Well, the fence follows your right of way and follows Mill Creek.

Q. Inside of that fence also there is a fence around the basins, isn't there?

A. Yes, there is a fence around the basins. A part of the fence on the west of the basin forms a west boundary line of our property.

Q. I call your attention now to lot 6 in block 49, is that within the fence of the Company which you have described?

A. It is.

Q. Is that part of the ground where they have been cutting hay?

A. It is.

Q. For how many years have they cut hay in that fence on that lot?

A. They have cut hay and grain there ever since 1888. Prior to that time there were weeds there.

Q. Is the situation of the south half of lot 4 in block 51 the [—] as 5 with respect to growing hay and grain on it?

A. The same exactly.

Q. Both of them within the fence of the Water Company?

A. They are.

Q. Who has planted the grain there, if you know?

A. Employees of the Water Company.

Q. And who have cut the hay there?

A. The Omaha Water Company.

Q. Has anybody else ever come in and interfered with that grain in any way during that time?

A. No sir.

Mr. HALL: I will now offer in evidence Exhibit 7, being the original tracing or map referred to, with the privilege of substituting a blue print thereof in place of this original tracing.

Received without objection.

Q. Mr. Hunt, are you acquainted with the 25 acres near Krug's Park?

A. Yes sir.

Q. Owned by the Water Company?

A. Yes, sir, I know where it is.

Q. Described as the west 25 acres of the south one-half of the northeast quarter of section 7, township 15, range 13, east 620 of the 6th principal meridian. You may state whether you know how that land came to be purchased by the Water Company?

A. Yes, sir, I do.

Q. State how it came to be purchased?

Mr. WRIGHT: That is objected to as being immaterial and irrelevant.

A. The officials of the Water Company made it known to me that they wanted to get a larger piece of ground at the highest elevation they could get in Omaha, within a reasonable distance, and I employed an engineer to go out and take levels all around, on all the high points outside of the city within a radius of 4 or 5 miles, and the highest point we could find for a large tract of land, large enough to build a reservoir on suitable for the City of Omaha and its future growth, was this tract of land known as the "Krug's Park Tract."

Q. What was the purpose of the purchase of that.

Mr. WRIGHT: That is objected to as being incompetent, irrelevant and immaterial.

A. The purpose was to build a reservoir there that would have good many days or weeks storage of water, to store water. Having it so that it would not be necessary to constantly run the pumps and run the danger of breaking the pumps and run out of water for the city.

Q. You may state as a water works man, from your experience whether you know and feel the usefulness of such a piece of ground to the Water Company, situated as this Water Company is?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. I do, I recognize the fact of the value of that piece of land when we paid two or three times what it was ordinarily worth for anything else, in order to secure it, in order to acquire it.

Mr. WRIGHT: We move to strike out the last part of the answer as being not responsive to the question.

Q. You may state what would be the value of such a piece to the Company, not in dollars and cents, but in what its value would consist.

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. The value consists in its elevation. That is the principle

thing—the elevation so that it will give the required pressure for fire purposes.

621 Q. Why would it be valuable on account of its elevation?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. Because there is nothing else anywhere near the same elevation.

Q. What is the value of the elevation. I want you to state it so the Court will understand it?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. The value is to give pressure so that it will carry the body of water high up.

Q. So it will carry the body of water high up?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, so the body of water would be high up, so as to give pressure.

Q. Do you know how high that is?

Objected to as being incompetent, irrelevant and immaterial.

A. Yes sir, I know approximately. I knew exactly once but I know it approximately now. It is about 25 feet higher than Walnut Hill reservoir which was the highest we could get at that time, and the Walnut Hill reservoir is 310 feet, and this would be about 335 feet, I mean above low water.

Q. That is above city datum?

A. Yes, above city datum.

Q. In making that purchase, Mr. Hunt, you may state whether the—or why it was considered necessary to buy the additional site?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. Because the basin we have now at Walnut Hill only holds 10 million gallons and that is less than one day's supply for the city now. As the city grows of course it becomes a still shorter period's supply.

Q. Do you know the circumstances, Mr. Hunt, of the purchase of lots 17 and 18 in Block 2 in Armstrong's Addition?

A. Yes sir, I do.

Q. You may state the circumstances under which those lots were purchased.

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

622 A. We wanted a station, or a place on which we could establish a machine shop, some place that we could carry steam and have a cut off between the high service and the low service lines, and it was deemed that that was as good a loca-

tion as we could get, as it was located near our large Cuming street main. The intention was to have an automatic valve operated by steam, and located in that building that was on these lots. We did, in fact, establish the shop there and put in a boiler and put in a cut-off valve and did operate it for a short time there.

Q. What would you say from your knowledge of Water Works, what would you say as to whether that place is conveniently located for that purpose?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. It is conveniently located for that purpose, and would have been all right for the city at that time, if the city wasn't going to grow any more, but it was [—] foolish thing to do for a city that was growing as Omaha was and is growing.

Q. So that the city outgrew that purchase, is that the fact about it?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. Yes, it practically outgrew it. In fact I think it was outgrown at the time it was purchased. I don't think it was a good move.

Q. Mr. Hunt, some complaint is made in the bill of complaint, as to the size of mains throughout the city of Omaha, on the ground that they are larger than they should be. You may state what the fact is about that.

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial, for the further reason that the witness is not competent to testify as to this, and this question simply calls for a conclusion of the witness.

A. They are not larger than they should be. I don't think a main can be too large.

Q. In what way are large mains a benefit to the City of Omaha?

Mr. WRIGHT: That is objected to as immaterial.

A. They are of great benefit in a great conflagration. For instance if the whole City of Omaha would get afire and burn at one time in a heavy wind, we would find that large main was a very good thing to have to give an unlimited supply of water.

623 Q. Mr. Hunt, you are acquainted with the Poppleton Avenue Station?

A. Yes sir.

Q. Do you remember when it was built? Just do you remember when it was built. I don't ask you for the date?

A. Yes sir, I remember when it was built.

Q. Do you know its construction, the way it is constructed, and what its purpose is?

A. Yes sir.

Q. Do you know the pumps that are in it?

A. There is only one pump in it.

Q. You may state what the value and usefulness of the Popple-

ton Avenue Station of the system of the Omaha Water Company is, why it is valuable?

A. Why it is valuable?

Q. In what way?

A. In increasing the pressure of the water from what it is now to what it should be in case of fire.

Q. Well, just show how it does that, Mr. Hunt, just describe it?

A. Well, it takes water from a pressure of 90 to 100 pounds and raises it up to 140 to 150 pounds.

Q. How is that useful?

A. Well, it is useful in raising that water to high points.

Q. Where and how?

A. Take the Hanscom Park District. It will furnish water under pressure where the reservoirs wouldn't do it. Gravity pressure wouldn't furnish water sufficient for fire, or even domestic service, because the elevation of the Park District is very nearly the same as Walnut Hill, but by having that pump there we can take the water from the Walnut Hill pressure of 90 to 100 pounds and force it up to whatever is required for fire or for domestic purposes.

Q. Then what you mean is it reinforces the high service as well as the other places, is that it—when used?

A. It makes the high service, furnishes the high service.

Q. Would the Hanscom Park district be the only district that that would apply to?

A. No. All high points in the south part of town, Bancroft and 10th Street, and Hascall's Park, and Vinton and 13th Streets, and in fact all that high district in Kountze's Addition south to Vinton Street, and everything south of Vinton Street on the high ground—and Krug's brewery on 24th Street.

At this point a recess was taken until 2 o'clock p. m., at which time the witness A. B. Hunt, who was on the stand at the time of taking the recess, resumed the stand and his examination in chief by Mr. Hall was continued as follows:

624 Mr. HALL: I will first offer in evidence, from the compiled ordinances of the City of Florence ordinance No. 9 found on page 61 and a part of 62, vacating streets and alleys, passed September 3, 1887.

The ordinance referred to is marked Exhibit 8, is received in evidence without objection, and a copy of the same is attached to this deposition and made a part hereof.

Mr. HALL: I will now offer in evidence Ordinance No. 31, Ordinance No. 32, Ordinance No. 34, of the City of Florence, found in the compiled Ordinances heretofore referred to, at pages 63, 64, 65, 66, 67 and 68.

Mr. WRIGHT: To each and every of the ordinances offered as above, to-wit: Ordinances Nos. 31, 32 and 34, we object for the reason that it is immaterial and incompetent, and does not tend to prove any of the issues in this case; no objection being made to the fact that they are not the original ordinances; reserving leave to make any correction if any error should be found to exist.

The Ordinances referred to are marked as follows:

Ordinance No. 31 Exhibit 9,
Ordinance No. 32 Exhibit 10,
Ordinance No. 34 Exhibit 11, and copies of each of them are hereto attached and made a part of this deposition.

Mr. HALL: I will now offer in evidence the proposition made to the Honorable Mayor and Common Council of the City of Florence, Nebraska, on August —, 1889.

The same is marked Exhibit Twelve.

Mr. WRIGHT: That is objected to for the reason that it is immaterial and incompetent, and does not tend to prove any of the issues in this case; no objection being made to the fact that it is not the original proposition, and reserving leave to make correction if any error should be found to exist.

A copy of Exhibit 12 is hereto attached, as offered, and is made a part of this deposition.

Mr. HALL: I also offer in evidence a copy of the letter of acceptance to the Mayor and City Council of the City of Florence, Nebraska, dated the 15 day of August, 1889, together with the certificate of the Clerk thereto attached.

The letter as referred to and offered is marked Exhibit 13.

625 Mr. WRIGHT: That is objected to for the reason that it is immaterial and incompetent, and does not tend to prove any of the issues in this case, no objection being made on account of the fact that these are copies, instead of the originals of the papers offered, no objection being made to the certification of the letter of acceptance; and reserving the right to make corrections if any errors should hereafter be found to exist.

A copy of Exhibit 13 as offered, is hereto attached and made a part of this deposition.

The examination of Mr. Alonzo B. Hunt then proceeded as follows:

(By Mr. HALL:)

Q. Now, Mr. Hunt, under the proposition to the City of Florence and the acceptance, and the ordinance vacating these streets and alleys, what course did the company pursue. Just state what they did?

A. Why, took possession.

Mr. WRIGHT: We move to strike out the answer as not being responsive to the question, and as merely stating a conclusion of the witness.

Q. That don't mean anything—that may mean your idea of what they did—but just state what they did with respect to that land.

A. Why they went on to the ground.

Q. Were there any houses on the lots there?

A. Yes sir.

Q. Just state what you did with respect to the whole thing.

A. You want me to tell what we did when we first went in?

Q. Yes sir.

A. The first thing was to go on and commence to level off the

ground and take the houses off—it was a city with streets and alleys and houses on there. Those houses were removed, taken off the grounds and the trees dug up and the grounds leveled off, and we commenced making excavations for the foundation of the engine house and the pumps, and commenced excavating cellars for the residence of our engineers and firemen, and took and moved off—there were some people living there still—had them move off and leveled that ground off and commenced stripping the black earth off the ground preparatory to building the basins. That all had to be stripped off first, and went on with construction work generally.

Q. Well, now just describe the extent of that work. How many men did you employ?

A. We had quite a number of men. We had from 800 to 1000 men there; that is, taking in the construction of the reservoirs, excavating wells and sewers and for pipe and taking out trees and getting in stone and riprap and the framing of the building, all going on together—all being pushed systematically.

Q. What kind of fills did you have to make there to level off that ground?

Mr. WRIGHT: That is objected to as immaterial.

A. We had some very deep ravines we run through. One of them ran southeast and another one running northwest, very deep ravines running down to a depth of 35 or 40 feet, one of them—and a very long ravine. And in leveling off the ground we took the black earth that we didn't consider good earth to build the basins substantially on, we stripped that all off and helped to fill up the ravines with that, and afterwards graded off higher points of the yellow clay and filled in.

Q. How long did it take you to level off this ground, do you remember?

Mr. WRIGHT: That is objected to as immaterial.

A. Well, the leveling commenced there in September '87, and we were a little over a year before we had it all—but we didn't keep constantly at that. We would take a part of the teams and work them on excavating the basins. Then when we got so it was pretty deep and crowded with a narrow bank on top we would take those teams and go to work leveling and stripping the grounds.

Q. That leveling went right over the streets and alleys the same as anything else didn't it?

Mr. WRIGHT: That is objected to as immaterial.

A. Over the whole thing. Commenced at the south side of our property line and went clear to the north side.

Q. You commenced in September, 1887?

A. That was my recollection that it was in September. I think it was '87.

Q. Then you had the leveling practically out of the way in 1888?

A. Yes, yes, the grading was pretty nearly all done with the excep-

627 tion of around Captain Reynolds' house. There was a knoll there that had to be graded after that, and we left that because we was not quite sure how we were going to do it finally.

Q. In 1890 was it that you built your outside fence around there?

A. It was a little earlier I think. We commenced before '90 I think. After we got our grounds graded we very soon afterwards put up the fence.

Q. Was that the fence around the basins or the outside fence?

A. I am speaking of the fence around our grounds, the rough fence of barb wire and posts to fence in our ground that we had bought, to fence in the whole thing to keep cattle out and to keep people out that might come in there to trespass. It was a rough post and barb wire fence.

Q. Now the post and barb wire fence stayed there until what time?

A. There is some of that there still along the right of way of this railway on the west side—a part of that fence from the north side of the right of way—I mean the south side of the right of way clear to Washington Street, the same fence that was built then, except there may be some new posts put in and some of the barb wire—but pretty nearly the same posts, and that is equally true of some of it up north towards Mill Creek.

Q. How long did it take you to construct your basins there?

A. Between three and four years.

Q. During that time about how many men did you have working there say for the first four years of that work?

Mr. WRIGHT: That is objected to as immaterial.

A. You mean on an average, every day?

Q. Yes.

A. About 500 men, I should say, about 500—oh, it would run more than that. I am speaking now exclusive of riprap work, I am not talking or riprap work, I am talking about the construction of the reservoirs and the buildings.

Q. I understand.

Cross examination.

By Mr. CARL C. WRIGHT:

Q. Did you commence grading the streets and alleys up there before you got the ordinance vacating them?

A. We commenced grading—well we must have done some of it. There are some streets and alleys laid out where our basins were. We commenced grading all our basins.

Q. You had the consent of the city I suppose.

628 A. I can't tell you just how that was. I know we commenced grading right along everywhere. I know, just as soon as—
Q. After the ordinance vacating the streets was passed, you had the consent of the city did you?

A. That I can't say. I don't know what kind of an agreement we had.

Q. You got some sort of an agreement with the city didn't you?

A. Well, I don't know. I presume probably we did, but I don't know.

Q. This Poppleton Avenue Station was not put in until after you had extended the mains into South Omaha, was it?

A. One small main had been extended to South Omaha when we put the Poppleton Avenue Station in, but the large mains had not.

Q. It was extended about the same time that you put in the Poppleton Avenue Station, wasn't it, this additional main into South Omaha?

A. No sir, we as receivers, Bierbower and myself, put in the large main. That was some time after the Poppleton Avenue Station was built. I don't know just how many years, but several years. I want to take part of that back. We extended the large main about the time the Poppleton Avenue Station was being built. Before it was completed we extended a main from Farnam street south on 18th and down on 18th or 18th Avenue, to Pierce street, and west on Pierce to 20th and on 20th to Poppleton Avenue, and that was to connect with this Poppleton Avenue pump, and we run part of a 16 inch stub line at the same time up Poppleton Avenue extending towards the Park. We didn't complete it, and at the same time took a 16 inch at 20th to connect with the 14 inch through Hascall's Park and out on South 10th street.

Mr. WRIGHT: I move to strike out that answer as not being responsive to my question.

Q. I am asking you whether about the time of the building of the Poppleton Avenue station, if there wasn't also an extension of the mains into South Omaha?

A. No sir.

Q. Now there are also pumps at Walnut Hill are there not, for the supplying of the high pressure area in the city?

A. Yes, sir just the same as Poppleton Avenue.

Q. Then Poppleton Avenue is only necessary in case of some accident to the Walnut Hill station?

A. It is in case of accident and also when we need extra water or extra pressure—an extra large draft. We have to run both of them together—this Walnut Hill station and the Poppleton Station have to be run together at times.

629 Q. That is made necessary by the fact of the large connection into South Omaha, isn't it?

A. Not necessarily, no. It is made necessary by reason of the vast amount of water being used up on the high hill district, the hill districts use so much—take south Tenth street and all that high territory from Kountze's place down clear across the hill and then west clear out to back of the Park, and there is so much building going up back of the Park now that a large amount of water goes out there.

Q. How much water is used in the Hanscom Park district daily?

A. That would be merely a guess with me, but I can tell you pretty nearly, I think. Probably four or five mil-ion gallons maybe,

according to the weather. Do you mean Hanscom Park alone or the whole of this high pressure district?

Q. I mean Hanscom Park alone.

A. That is what I mean then.

Q. What is used in the high district over at 10th and Bancroft?

A. That would be a guess again. There isn't so much used as in the—

Q. Well, about what would you estimate it?

A. There might be half that amount.

Q. From 2 to 2½ million gallons a day.

A. Yes, sir, not over that, I think.

Q. You would say then that there were 6 to 7½ million gallons a day used in these two high pressure districts, would you?

A. Yes, sir, ordinarily, without a fire being there.

Q. What is used ordinarily in South Omaha, daily?

A. You mean on high pressure again?

Q. Well, no, that is supplied by the pump?

A. Well, there is only domestic supplied by high pressure in South Omaha. We do not supply any of the packing industries by that.

Q. Isn't it forced through by the pump at Poppleton Avenue?

A. No sir.

Q. Not even during fire pressure?

A. For packing houses no sir, not at all. We never have turned on the high pressure yet at any of the fires at the packing houses and stock yards. The high service is only furnished to South Omaha through the Poppleton Avenue Station or the Walnut Hill station—which is the same thing—either one of them—to the residence portion—I can say the residence portion east of 24th Street. A very little of that west of 24th street is furnished by high pressure for domestic use.

630 Mr. WRIGHT: I move to strike out the last part of this answer as not being responsive to my question.

Q. Now, I ask you how much is used daily from the high pressure furnished from the Poppleton avenue station, how much in South Omaha?

A. It would be impossible for me to divide that up. You can guess it as well as I could. It would be mere guessing with me.

Q. Well, one or two million gallons a day?

Mr. HALL: I object to his guessing at it, as being entirely incompetent.

Mr. WRIGHT: He has guessed at the others.

A. Well, I don't think there could be over a million gallons.

Q. Then about half the daily supply of the Omaha Water Company is furnished to the high service districts in Hanscom Park, and the high service district near 10th and Bancroft, and the high service district in South Omaha, isn't it?

Mr. HALL: That is objected to as assuming a thing not proven, and as putting the words into the mouth of the witness.

A. No, there is not.

Q. What is about your average amount per day in Omaha—say the average per day in Omaha and South Omaha?

A. It runs from 15 to 24 million gallons.

Q. Then your estimate on these high service districts is that from 7 to 8 million gallons per day are used in those districts.

A. I tell you I have no meter on it, but that is what I would guess.

Q. You are still of that opinion are you?

A. I am still of that opinion, yes sir.

Q. You know there are about 4 million gallons a day used in the South Omaha Packing houses, don't you?

A. I don't, no sir. There is nothing used through the high service by the South Omaha Packing houses. I want that distinctly understood.

Q. When you said 15 to 20 million gallons a day that includes high and low service, don't it?

A. No, it means what is pumped from Florence.

Q. But that is furnished through high service and low service?

A. Yes sir.

Q. So the total amount furnished by both high service and low service is from 15 to 20 gallons a day?

631 A. I just fixed the maximum at 24 and I fixed the minimum down to 15 million.

Q. It varies between 15 and 24 million gallons a day?

A. Yes sir.

Q. And 24 millions is the maximum in case of a great demand for water?

A. In case it is very dry or in case of fire.

Q. Now all of the high service which is supplied by the Poppleton Avenue station can be supplied by the Walnut Hill station can it not?

A. It could not at all times, no.

Q. It can be when the pumps at Walnut Hill are working can it not?

A. Well, if we don't have any fires it can, but if we have any fires it cannot, because of the long distance and the friction.

Q. That is, the long distance and the friction would prevent giving pressure?

A. Giving proper pressure, yes sir. In case of a large fire we would have to start the Poppleton Avenue station if we had a fire in the South 10th Street District by the Hospital or in the district back of the Park. If we had a big fire in either one of those districts we would have to start up the Poppleton Avenue Station in connection with the other.

Q. You spoke about the size of mains, and you said there were no means [—] could be too large.

A. I mean by that that it is always best to be on the safe side in case of a large conflagration.

Q. That is, if you would increase the size of your mains in the city, it would furnish a better fire protection?

A. It would insure a greater supply of water where it was called for quickly.

Q. The fact is the mains are laid in proportion to the anticipated demands; and economical construction of the plant requires that the mains shall not be beyond the anticipated demands, doesn't it?

A. Yes, that is right. The mains are always planned to give the required amount of water that will be approximately required, that they think will be required. Business streets need larger mains than residence streets.

Q. What mains do you have running into South Omaha?

A. We have two running into South Omaha. We have a 16 inch main running into South Omaha, that is from our line where it extends down Vinton Street—it extends down 24th street into South Omaha.

Q. What other main have you?

A. Then we have a 30 inch main that extends from the 36 inch main—that is the 36 inch main in Omaha—that starts at 24th street and turns west on what I think they call Boulevard, opposite 632 Krug's Brewery, and goes west about 2 blocks, which would make it 27th street.

Q. That main you are speaking of is shown in blue on the map marked Exhibit 5, isn't it, as it crosses the city limits?

A. Yes sir.

Q. Now, can you tell me, if South Omaha wasn't connected with the plant what would be the use of that 30 inch main from the north city limits of the city of South Omaha, north as far as Poppleton Avenue?

A. We would then run it down into this district—(indicating)—it would run west on—there are no streets laid through there.

Mr. WRIGHT: I move to strike out the answer of the witness as being entirely unresponsive to the question, and I ask that the question be read, and that the witness answer the question.

Q. (Read.) Now can you tell me, if South Omaha wasn't connected with the plant, what would be the use of that 30 inch main from the north city limits of the city of South Omaha, north as far as Poppleton Avenue?

A. Why, it would be a supply main for all our laterals.

Q. Do you supply from that main between Poppleton Avenue and the north line of the city limits of South Omaha?

A. No, but it could be made into one.

Q. Let me ask you then; is there any use made of that main from the north line of the city limits of South Omaha to Poppleton Avenue, except to supply South Omaha?

A. There isn't only in case of breaks, and it would then be connected in, and there are valves shutting it off. That would then immediately become a red line turn out into the high service.

Q. But it is not connected with any house or domestic supply is it?

A. Yes, sir, there are taps there.

Q. And house connections?

A. Yes, sir, I know I can think of one or two. There is one at the shot tower for one.

Q. Is that connected from the 30 inch main, or from the high service, at the shot tower?

A. There is no high service there. The new shot tower is on 24th, and there is a number of new houses there.

Q. Where is the new shot tower?

A. The new shot tower now I think is at Martha Street. It is way out on the highest point.

Q. Is that connected with this 30 inch main, on 24th Street?

A. Yes sir.

Q. And you say it is on 30th Street somewhere?

A. No.

633 Q. I thought you said the shot tower was on 30th and Martha?

A. I mean 24th Street. I mean the 30 inch main on 24th Street.

Q. The shot tower is on 24th Street?

A. I think so.

Q. Now there wouldn't be any necessity for so large a pipe as 30 inch in that district, if it wasn't for supplying South Omaha?

A. If we was going to lay it out for something else entirely I suppose it wouldn't be so large a one. But now we will suppose, for instance, to carry out your idea, that that was cut off from South Omaha. Then we would turn this open valve right here (indicating) and make a high service of this.

Q. You mean Poppleton Avenue and 24th?

A. Yes, and also at Vinton and 24th.

Q. And the ordinary size of pipe which would be needed to supply Krug's Brewery and other industries along 24th street would be a 6 inch pipe, wouldn't it?

A. Yes, for 24th street alone, it would be, but suppose you were going to supply Vinton Street, it would not.

Q. You have ample supply along Vinton Street from the high service, haven't you?

A. We have at present.

Q. So for the present, if you were not supplying South Omaha there would be no practical need of this 30 inch pipe from the north city limits of South Omaha up to Poppleton Avenue, would there?

A. Maybe 24th would be all right.

Q. Wouldn't a six inch pipe be enough?

A. No sir, it would not.

Q. What industries are there along 24th street between Poppleton Avenue and the north city limits of South Omaha?

A. It is so high that if you had a six or 8 inch pipe the water wouldn't flow there at all either for domestic or other service. The higher the ground the larger the pipe you have to have.

Q. Is this as high as the Hanscom Park district?

A. I think from "B" street it is very near as high.

Q. Is it as high as 10th and Bancroft?

A. Oh, I think it is higher. 24th near Martha there is very high

Q. It is higher than 10th and Bancroft, is it?

A. No, sir; I didn't say it was higher. I said it was high service ground.

Q. You supply the high service district over at 10th and Bancroft streets from a 6 inch pipe, don't you?

A. Yes, but this line on Vinton street is a 16 inch pipe.

Q. But you could supply the 24th street District through a 6 inch pipe, couldn't you?

A. Not for any distance, no, sir.

634 Q. Is that distance as great as it is over at 10th and Bancroft?

A. It is from a large main, yes.

Q. You have already a 16 inch main just 2 blocks west of 24th haven't you—or east, I should say, on 20th street?

A. 16 inch, if I remember right.

Q. And that is only 4 blocks from 24th Street?

A. Yes, but the streets are not all opened up through there.

Q. But you could supply it from the 16 inch main on 20th street, couldn't you, the district on 24th Street?

A. You could supply it if you could get across.

Q. You do have a high service pipe straight across this 24th Street main on Bancroft Street?

A. We have a high service, yes sir.

Q. 6 or 8 inch pipe?

A. Yes, we have across there for a few blocks, a few hydrants.

Q. Now, isn't it a fact, Mr. Hunt, that you have put in a larger main on 24th Street north, than you otherwise would have constructed for the supplying of that district, on account of the fact that you have to supply South Omaha through that main?

A. That was one of the reasons we put it in, yes sir.

Q. And if it wasn't for that fact, good, economical construction of the plant would not require so large a main or any of that main from 24th Street?

A. Yes, sir, it would, certainly.

Q. From Bancroft street south?

A. Yes, sir, because that is what we depend on for our supply for the Park District.

Q. Do you supply the Park District out of low service pipes?

A. Certainly from the Poppleton Avenue Station.

Q. How much have you used the Poppleton Avenue pump?

A. I don't know how much, but we have used it frequently.

Q. Didn't you testify in the case in United States Court, the hydrant rental case just recently tried, that it had been used only about thirty days?

A. In how long?

Q. In 2 years.

A. Well, that would be right if I looked it up before I testified to it.

Q. That would be your opinion now, wouldn't it?

A. If I testified that, that is certainly what it was, if I looked it up. I went and looked it up.

Q. Now, the only time where the high service is supplied out of this large main on 24th Street is in case of an emergency where it is taken out through the Poppleton Avenue station and forced into the high service system?

635 A. It is taken out whenever we run the Poppleton Avenue Station.

Q. You run that only in case of excessive demands for water, or in case of fire?

A. In the last two years we haven't run the Poppleton Avenue station so much, but formerly we ran it constantly. There were years that we never stopped the Poppleton Avenue station at all.

Q. Why did you stop using it?

A. Because we put another pump in at Walnut Hill and that helped to relieve it.

Q. So that now it is necessary only in an emergency or in case of an excessive use of water?

A. I object to saying in case of an emergency. It is true that it is an emergency pump but that is not the reason we run it.

Q. Well, I mean an unusual demand for water.

A. We run it when it is more economical to run the Poppleton Avenue station.

Q. If extra pumps were put in at Walnut Hill, and large pipes were put in, it would answer the same purpose as the Poppleton Avenue Station?

A. If we put in more pumps and large enough pipes, yes, we possibly could do that, but it would not be economical to do that.

Q. Do you know how many industries are furnished along 24th Street, running between the City limits of South Omaha and Poppleton Avenue in Omaha?

[Q.] Do you say industries?

Q. Yes, and private taps?

A. A good many private taps, but no industries. I don't know of one service for any kind of industry.

Q. What industry is supplied, or what private or domestic use or service is made of this low service 30 inch pipe from Poppleton Avenue to the north line of South Omaha?

A. The shot tower is one of our consumers, and Krug Brewery is another one. I can't think of the high service, I don't know of any industries along there. I can't think of any.

Mr. HALL: Doesn't the street car barn get its supply there?

The WITNESS: Oh, yes, that's right, the street car barn.

Q. Doesn't the street car barn get its supply from high service?

A. No sir.

Q. Your high service pipe comes in on Vinton Street?

636 A. Well, now, I am not posted on the service so well as I am—I think they take it out of 24th—I think the shot tower and the street car company—I think the railroad company has a crane there at 24th—I can't think of any large—

Q. What use have you for a high service pipe west of 24th on Vinton Street, up to where Krug's Brewery is located?

A. In case of fire all the hydrants are connected on high service,

so they could get in high service anywhere on 24th street from say 24th and Center Streets clear out to 24th and "F" or "K" streets.

Q. Then this 30 inch pipe on 24th street south of Poppleton Avenue to the limits of South Omaha does not furnish fire service of any of those places?

A. No sir.

Q. Do you know of any other domestic use made on this 30 inch pipe from Poppleton Avenue South to the South Omaha limits?

A. Oh, there are others, but I can't name them. I can't tell you even on Farnam street what services we have there.

Q. Do you know that there are other domestic services attached to that low service pipe to which I have called your attention. I am speaking of the 30 inch pipe.

A. I can't specify one. I can't name one, no.

Q. Could you by examining the books determine just what industries are supplied from that pipe and what domestic services are supplied from the low service pipe, the 30 inch, on 24th Street, south of Poppleton Avenue, and extending west to 27th Street, and north of the South Omaha City limits.

Mr. HALL: That is objected to unless counsel states whether he means service blanks or not.

A. I presume I could but it would be quite a task to look it up.

Q. Don't you have it arranged to show on streets—what your taps are on streets?

A. No, they are not arranged by streets. They are arranged by service numbers. Your service number might be 1420 and mine might be 1521, but they are not arranged by the streets. I don't know just where to go to look to find that out. If it would be a large service I possibly could get it in another way.

Q. The fact is, is it not, Mr. Hunt, that your entire line on 24th Street, south of Poppleton Avenue, the low service line on this street south of Poppleton Avenue, and also on Boulevard Street—or Boulevard—not the street I think, but the boulevard, and on 27th street north of the city limits of South Omaha, is used exclusively for South Omaha low service supply?

A. You ask me a compound—yes, I guess a triplicate question there. I can answer that question but I will have to answer 637 it in a different way. If you will let me answer it in my own way I can answer it. From Vinton Street and 24th Street, west on Boulevard to Krug's and from Krug's south to the city limits, it is true we wouldn't need it if it wasn't for South Omaha, with the exception of the Krug Brewery. Of course that takes a large amount of water. With that one exception we wouldn't need it. But the other from Poppleton Avenue to Vinton Street is necessary, as I explained before.

Q. Haven't you out to Krug's Brewery, a 12 inch pipe, high service, connecting with your 16 inch high service pipe at 24th and Vinton streets?

A. We have, but we don't propose to furnish water that we have to pump over two or three times at the low rate we get, to a brewer or any other industry.

Q. That would be sufficient to supply Krug's Brewery wouldn't it?

A. Yes, it would be sufficient, but we are not going to furnish water that has to be pumped two or three times, not for the rate we get from them, and if we had a big fire I wouldn't want Krug's Brewery drawing off the water from a 12 inch pipe either.

Mr. WRIGHT: I move to strike out the answer of the witness—so much of it as is not responsive to my question.

A. (continued). Then I would say that it wouldn't do.

Q. Do you want to say that a 12 inch pipe would be sufficient to supply Krug's Brewery or would not be sufficient?

A. It would not be sufficient to supply that and a fire too.

Q. How much water a day do they use at Krug's Brewery?

A. I don't know how much a day they use.

Q. How much pressure is there at the corner of Vinton and 24th on the high service, 16 inch pipe?

A. I can't tell you that.

Q. How much water will flow through that 12 inch pipe connected with the 16 inch pipe at 24th and Vinton, at the pressure afforded by your high pressure service?

A. I can't tell.

Q. How are you able to tell then that it would not be sufficient to supply the water for Krug's Brewery, as you say, for a fire too?

A. Common sense would tell me that without putting on any gauge or anything else. In a 12 inch pipe running off at the high service, west of Krug's brewery—if the hydrants on that line were open for a fire and Krug's Brewery was drawing off any water, there would be no pressure. The static pressure would be all right, but at a fire there would be no pressure.

638 Q. That would be true also of other lines drawn off on this high service pipe, for instance on Boulevard Street east of 24th, wouldn't it?

A. Boulevard east of 24th—there is no large line there drawing off.

Q. There is an 8 inch pipe there drawing off, isn't there?

A. On what industry?

Q. No industry?

A. I am speaking of Krug's Brewery drawing off through the 12 inch pipe.

Q. How can you tell if you don't know how much water they use, what the effect would be?

A. Well, I know that they certainly would be drawing off in the day time.

Q. They wouldn't be drawing off any if they had a fire there would they?

A. Very apt to have every connection in the brewery open trying to put it out.

Q. The entire mains—the large main running from Florence to Omaha, is required to be larger in order to supply South Omaha than it would be if South Omaha wasn't connected wouldn't it?

Mr. HALL: That is objected to as not proper cross examination,

not referring to anything that was asked of this witness in the examination in chief.

A. No. I would have a 40 inch main now from Florence to Omaha if I had my way, right now, for Omaha alone.

Q. Then you think a 36 inch main from Florence to Omaha is not sufficient?

A. I think a 40 would be better. I am in favor of larger pipes always.

Q. Doesn't it require a larger pipe between Omaha and Florence by reason of the fact that you supply South Omaha through that pipe?

A. The more water that is drawn through it the larger the main would have to be, yes sir.

Q. Then the answer to my question would be yes, wouldn't it?

Mr. HALL: I object to that as an assumption of what the answer of the witness would be.

A. I intended to answer you so.

Q. (Read:) Doesn't it require a large pipe between Omaha and Florence by reason of the fact that you supply South Omaha through that pipe?

A. Yes.

Q. Now referring to the tract of land near Krug's Park, the 25 acres, when was that purchased?

A. The 25 acres?

639 Q. Yes?

A. That was purchased in 18—well it was purchased at the same time that we were building the Poppleton Avenue Station. I can't tell just what year that was, '88, I think.

Q. Deeds were delivered to the Company at that time?

A. At the time we bought it we had deeds delivered, yes sir.

Q. With the proper date upon them?

A. Yes sir.

Q. Have there ever been any works constructed of any kind on that tract?

A. There has not.

Q. When were the lots in Armstrong's Addition purchased?

A. They were purchased in 1887.

Q. That was at a time when it was contemplated having a cutoff so as to furnish direct pressure from the pumps in case of fire wasn't it?

A. It was to be an automatic cutoff with direct pressure from Walnut Hill?

Q. So that direct pressure could be had from the pumps and put on the high service, or on all the service?

A. No, just on the high service.

Q. When were there any works constructed there?

A. Where?

Q. In Armstrong's Addition?

A. They were constructed right away as quick as we bought the property.

Q. Were they ever attached to the pipes for working purposes?

A. Yes.

Q. When were they taken out?

A. After we abandoned our machine shop there, and our superintendent died.

Q. When were the works taken out of these lots in Armstrong's Addition?

A. The what?

Q. Your engine or machine shop?

A. About three or four years after they were installed, four years I will say.

Q. That would be about 1890?

A. Yes.

Q. Since that time what use has been made of those lots by the Water Company?

A. There are houses on them. The machine shop was turned into a house.

Q. And it is rented?

A. It is rented.

Q. It is not now connected with the Water Work's plant except as taps are run in for the domestic supply?

A. Except that there is a sewer or tunnel which to run the pipe through, connected up into the basement, but the main valves and the larger pipe were taken out.

640 Q. Now, referring to the plat which you have identified, of the grounds down near the Burt street station, which is marked Exhibit 6. Do you say that you have had a fence at all times around where this red line is shown, except the river front?

A. Except where we drive into it, our roadway.

Q. Right south of your pumping station?

A. Yes.

Q. And that never has been enclosed there?

A. The driveway, no, we haven't had any gate on the driveway. We did have for a time, when we had lots of small material, but we haven't had for the last years, haven't had any at all.

Q. You say that what is shown in the red line north of the basin you have rented?

A. We rented from the Union Pacific, yes sir.

Q. Did you rent Izard street from the Union Pacific?

A. The Union Pacific claim it. Izard Street has been abandoned a long while ago and we rent——

Mr. WRIGHT: I move to strike out the answer of the witness as not responsive to the question.

Q. I asked you do you rent any portion of Izard street from the Union Pacific?

Mr. HALL: Do you mean the ground you claim is Izard street?

The WITNESS: We rent all this here, all of that ground that our basin is on.

Mr. HALL: Now where from to where, give the points so the reporter can get it in the record.

The WITNESS: It is from the point at the northwest side of the red line, as shown by this basin. There is a basin on there.

Q. Now you mean to say you rent that portion of the ground which is marked on the plat as Izard Street, from the Union Pacific?

A. All the ground our basin is on.

Q. Is that a written lease?

A. Yes sir.

Q. Have you that?

A. It is a written lease, as I remember it now, extended from year to year.

Mr. WRIGHT: I now move to strike out all he has said about renting this ground, as not being the best evidence, it being shown that it is under a written lease.

Q. Now you went in in possession of this ground here, with 641 the permission of the city, did you not, when you put up your pumping station, by virtue of an ordinance granting you that right?

Mr. HALL: That is objected to as calling for a conclusion of the witness.

A. We went in there by virtue of a deed that we got from the Union Pacific and others, and took possession and built our works.

Q. And your title to that is based upon a deed from the Union Pacific, is it?

A. That is my understanding of it.

Mr. WRIGHT: I now move to strike out all his testimony in relation to the title of this property, as not being the best evidence, and as being shown to be in writing.

Q. Now, Mr. Hunt, don't you know that a large portion of this land lying along east of your—in this red tract, and east of what is shown upon this map as the block lines, indicated on the north and south line running through this as Omaha Water Company, belonged in Government Levee lots?

Mr. HALL: That is objected to as not being the best evidence.

A. No, sir, it all belonged to the Water Company.

Q. Don't you know that is part of the deeded land to the City of Omaha as levee property?

Mr. HALL: That is objected to as not proper cross examination and incompetent.

A. I told you it was Omaha Water Company's property.

Q. Don't you know that land is a part of the plat of the City of Omaha in its original dedication under levee property?

Mr. HALL: That is objected to as being incompetent.

A. I have a lot that I bought and I paid for it and own it, and it is a part of the plat of the city of Omaha.

Mr. WRIGHT: I move to strike out the answer of the witness as being a conclusion and as not being responsive to the question at all.

Q. I see marked along here "Omaha Water Company," what does that mean?

A. It is written inside there to show that this enclosed line is Omaha Water Company's property.

642 Q. I notice that "Omaha Water Company," part of it, extends out of that red line, how do you account for that?

A. Just the same as you might write something there and it would go outside of the line.

Q. You mean that was put in for the purpose of designating this red portion, do you?

A. Yes, sir, my idea is it was in that red line designating the property owned by the Omaha Water Company.

Q. Then the red line was put on some time after this map was made, and this "Omaha Water Company," was printed in there?

A. The red line wouldn't print in a blue-print, and that red line was put there to give it a different color.

Q. This "Union Pacific Railroad" has been in there all the time, hasn't it?

A. There has been a track in there.

Q. Did they deed you that part of the ground with their track on it?

A. No, we let them put it in there because they were putting in stone and stuff for us to build with.

Q. You say they didn't have all the time a right of way in there?

A. No sir. They had a track in there.

Q. They had a track in there when you first went in there?

A. They laid one in there to put in riprap—when we put—

Q. The Omaha Water Company has a deed from the Union Pacific of this property, have they?

A. I never seen that. All I know is what Mr. Johnson, the president of the City Water Works Company—and Mr. Sheldon, the manager—told me, that they had secured that property from the Union Pacific. I don't know whether by deed or how.

Q. They didn't tell you what they had secured?

A. They certainly did, and told me to go down and survey it—gave me the boundary lines and told me to make a contour map of it, and told me to prepare the grounds for basins, and I did do that.

Q. That is all you know about it is it?

A. All I know is that the Union Pacific never interfered with us. They never stopped us from working on this ground; they knew it belonged to us.

Q. Then they didn't convey it to you?

A. They conveyed it to the Omaha Water Company, not to me, no.

Q. It was after the Omaha Water Company was formed that they conveyed it?

A. To the City Water Works Company.

Q. Did you make this survey upon which this map is made?

A. I helped make, helped make the first survey that was made there.

643 Mr. WRIGHT: That is not an answer to my question, please read the question.

Q. (Read:) Did you make this survey upon which this map is made?

A. That tracing may have been made by somebody else. It may not have been the same map I made.

Q. It is true that the Illinois Central runs their main tracks into the city of Omaha over this right of way there, is it not?

A. They have during the last few years, yes sir.

Q. And are using and occupying that now as a main track for passenger trains?

A. I don't know as they are to-day, but they were the last time I knew anything about it.

Q. You haven't heard of their tracks being taken out have you?

A. Well, I don't know whether they are using that. I know that for 12 or 14 years they didn't occupy it.

Mr. HALL: Who do you mean?

The WITNESS: The Union Pacific—this right of way he speaks about here on the east side of our grounds, and shown here by the red line on this map, shown as "U. P. Railway Shops, short line." It is simply a dead sidetrack.

Q. I notice "Government Lot 3," who put that on there, is that a part of your original survey?

A. I can't tell you whether it was or not.

Q. How about this "Government Lot 4"?

A. Well, there were two or three pieces that you call my attention to now, that we acquired—there were squatters on there that acquired the right to it by 10 years' possession. I bought them out as I remember now, getting a quit claim deed, and then I turned that over to the Water Company.

Mr. WRIGHT: I move to strike out the answer as not being responsive to my question.

Q. I was asking you whether these "Government Lots 3 and 4" were [were] a part of your original survey, when you made the survey down there?

A. Well, I don't know. They were not designated then as "Government Lots 3 and 4," at least on any city map that ever I saw.

Q. Do you know the Davis map?

A. No sir, I don't know the Davis map. I know we had an engineer by the name of Davis, if that is who you mean.

Q. Don't you know that it showed those lots there all the time as Government lots?

A. No sir, I don't know that.

644 Q. Speaking of the Florence track, and referring now to the map which you have presented and which is marked Exhibit 7—the railroad track shown upon this map along east of the reservoirs is where the track itself was laid, is it, originally?

A. Where the track was laid—no, that is where we laid it to put in our rip rap. The original track was washed out. We never had any map of that.

Q. Do you know where the boundary line of their right of way was, the west boundary line of the railroad company's right of way?

A. It was very close to the edge of this—very close to the other track (Indicating).

Mr. HALL: Hunt, you must give that so the reporter can get it.

Q. (Read.) Do you know where the boundary line of their right of way was, the west boundary line of the railroad Company's right of way?

A. It was between the track shown on the east—the present track shown on the east of our basins (on Exhibit 7)—be—about half way between that point and the river line as shown on this map—the river line of the riprap.

Q. Now, you say you built that out into the river some little ways, did you, beyond where it originally was?

A. Yes sir.

Q. Then the railroad had a hundred feet right of way there on the river bank, did it?

A. No sir.

Q. How much?

Mr. HALL: That is objected to as incompetent and not the best evidence.

A. I believe they claimed 20 feet, or just enough for the track, that is what they told us.

Q. That is what you were basing your testimony upon, that the right of way was washed away—upon a 20 foot right of way?

A. 20 or 30 feet, yes sir, that is what I based it on.

Q. You notice along here where the right of way is marked, near block 1, of the "M. & O." tracks, it shows a hundred foot right of way, doesn't it?

A. Yes, but that is our own track.

Q. This whole track has been used within the last 6 years by the "M. & O." railroad company, running its trains over it, hasn't it?

A. Well, no.

Q. You said about 5 years ago?

Mr. HALL: You are thinking about another thing. Don't get off on something else.

645 Q. Where did they run their trains about 5 years ago, and up to that time?

A. They ran around on the track that laid where this track is shown here. They ran on that track. There is no track there now. They go in our switch across this trestle (indicating) here, and run across a bridge that we built here (indicating on the map).

Q. Where? (Looking at the map.)

A. At Mill Creek and back on their own right of way again, northwest of Mill Creek—of our pumping station.

Q. How did they get on to the track from the south?

A. I don't know. I never went down far enough to see.

Q. But they ran their trains up along through block 38, through block 29, through block 28, through block 19, through block 10, through block 9, through block 8—or a corner of block 8, across through block 1 and up through block 127, didn't they?

A. The trains you mean?

Q. The trains.

A. They ran an engine and a passenger car or a caboose car once a year.

Q. Through or over the track which I have described?

A. Yes. They do run trains on here, of coal for the water company, and do still, to the point where we took the track out.

Q. Do you say there is no track now anywhere east of the reservoir?

A. No sir, not from about the center of block 10.

Q. When were they taken out?

A. Oh, they have taken them out within a year.

Mr. HALL: Do you say "they"?

A. The railroad company has taken them out within a year. They tried to hold possession and we fought them and they finally gave it up and took them out.

Q. They gave up about 5 years ago?

A. No, they took up their tracks within a year.

Q. Until within a year the track has been there?

A. Yes sir. It was grown up with brush and weeds and they took them up within a year.

Redirect examination.

By Mr. HALL:

Q. Mr. Hunt, supposing there was no South Omaha at all, would you be able to get along here in Omaha with a smaller main than that 36 inch main?

A. No sir, we would not.

Q. I understood you to say to Mr. Wright, on cross-examination, that that 36 inch main had to be as large as it was on account of there being water furnished to South Omaha, is that right?

646 A. No sir, that is not the way I understood it.

Mr. WRIGHT: I didn't either.

Q. Is that 36 inch main any larger than is required for the use of Omaha, if Omaha was alone?

A. No, it is not. I would advise putting in a larger one still for Omaha alone.

Q. Now why?

A. Because in case of an emergency—in case of a conflagration a large fire, it is safer to have a large volume of water that it is a smaller one. It is easier for the pumps to work.

Q. So that while a 36 inch main may be large enough to furnish South Omaha it is not any too large to furnish a proper measure of safety for Omaha, is it?

Mr. WRIGHT: That is objected to as leading and calling for a conclusion of the witness.

Mr. HALL: Well, I think that is leading.

Q. You may state—explain that so the Court can understand it, Mr. Hunt.

A. Explain what.

Q. The way you were answering in respect to the main having to be larger on account of South Omaha.

A. I don't think I get you.

[A.] Mr. Hunt, on cross-examination you were asked this question; "Doesn't it require a larger pipe between Omaha and Florence, by reason of the fact that you supply South Omaha through that pipe?"

And you answered that as follows:

"The more water that is drawn through it, the larger the main would have to be, yes sir."

Now, did you, in answering that, understand that question to be a hypothetical one or one applying to the facts as they now exist?

A. I understood that as a hypothetical question.

Q. Applying it now to the facts as they exist today, what would you say as to whether the main from Florence to Omaha would or would not, be smaller in the event that it did not have to supply South Omaha?

Mr. WRIGHT: That is objected to as incompetent, and because it is basing an opinion upon facts which are not set forth in the evidence.

A. The pipe should not be smaller.

Q. Suppose you took South Omaha off of it, could it be made any smaller, properly?

647 A. No, I have already stated that that line should be larger than it is now, even if South Omaha was off entirely.

Q. Now, Mr. Hunt your attention has been called by Mr. Wright to the 30 inch main from Poppleton Avenue to the South Omaha City Limits. Assuming, for instance, Mr. Hunt, that South Omaha was not in existence, would that 30 inch main still be serviceable for the plant in Omaha?

A. Yes, up to Boulevard Street it would—Boulevard and 27th streets, from Poppleton Avenue on 24th Street to Boulevard Street.

Q. Now, as the City grew, Mr. Hunt, it would make the 30 inch main a good and valuable service pipe for that part of the city, to supply the laterals, wouldn't it?

Mr. WRIGHT: That is objected to as leading, and not proper cross-examination.

A. It wouldn't make it a service pipe, it would make it a good main.

Q. The only effect of that would be to give an increased supply for a time, isn't that all?

Mr. WRIGHT: That is objected to as leading and argumentative.

A. It would give an increased supply, of course.

Q. What I am getting at, Mr. Hunt, is, is there any bad economy in having a 30 inch main in there at all, what is the fact about that?

Mr. WRIGHT: That is objected to as leading and calling for a conclusion of the witness.

A. No, it is a good investment, good money. It could be used either as high or low service.

Q. Does Krug's Brewery take any supply from that 30 inch main?

A. Yes.

Q. I wish you would explain, Mr. Hunt, why it would be bad economy—

A. (continued). You asked me if they take a supply from the 30 inch main. They have got a 6 inch pipe running in off the 30 inch.

Q. I wish you would state, Mr. Hunt, why it would be bad economy to have Krug's take their supply from a high service main instead of a low service main?

Mr. WRIGHT: That is objected to as leading, immaterial, and calling for a conclusion of the witness.

Q. (continued). You were trying to tell that on your cross-examination when Mr. Wright interrupted you.

A. The water coming through the low service main only 648 has to be pumped twice, first into the settling basin to clarify and purify it, then into the Walnut Hill reservoir, whereas the high service has to be pumped into the basins, then into the Walnut Hill basins, and then the third time either pumped from Poppleton Avenue or Walnut Hill, which is the same service line, and it costs money to pump water. Every pumpage you add to it increases the cost of the water.

Q. For that reason it would be more economical to deliver water to Krug's Brewery from the 30 inch main than from the high service main, that is in there now? What would you use the high service main in there for?

A. We have to use it in there for fire protection, because it is a very high point.

Recross-examination.

By Mr. WRIGHT:

Q. Mr. Hunt, it would be cheaper to furnish water in Hanscom Park from the low service system than the high, wouldn't it, for the same reason that it would be cheaper to furnish Krug's Brewery through the low service system?

A. It would be cheaper if you could, but you couldn't reach into some of the houses by the Walnut Hill pressure.

Q. I am referring to the Park itself?

A. The Park itself.

Q. Yes, where you supply the pond and city water?

A. Yes, it would be cheaper.

Q. It would be good economy then to run a 30 inch pipe in there?

A. It wouldn't pay to run it in there where we are giving the water to the city.

Q. It wouldn't pay you to run it to Krug's Brewery, either, would it?

A. He pays for the water.

Q. Do you mean to say that it would be good economy to run a pipe 8,000 feet to supply one industry down there rather than to supply it out of the high service that is already built?

A. I didn't state that we ran it 8,000 feet to supply Krug's Brewery.

Q. But you mean to say that it would be cheaper to furnish water out of the low service than out of the high service?

A. It is one-third cheaper because it saves one-third of the pumping.

Q. Do you want to say that it is good economy to run that 30 inch pipe all the way to South Omaha, unless South Omaha was connected on to the end of it—the South Omaha distribution.

649 Mr. HALL: That is objected to because it is purely assumption, and because the witness has not so answered, and because there is not one single fact to justify the question.

Q. (Read.) Do you want to say that it is good economy to run that 30 inch pipe all the way to South Omaha, unless South Omaha was connected on to the end of it—the South Omaha distribution.

A. We certainly wouldn't run pipe to South Omaha unless they were going to take water through it.

Q. You wouldn't run any 20 inch pipe down there unless they were going to connect on to the South Omaha distribution, would you?

A. Down where?

Q. From Poppleton Avenue south to the city limits to South Omaha?

A. We certainly would. We had one line down there already.

Q. You already had a 16 inch line down there on 20th Street?

A. Yes.

Q. But you wouldn't run another one after having a high service line through there, you wouldn't run a 30 inch low service all the way down there unless you were going to supply South Omaha?

A. Yes. We couldn't supply through a 16 inch pipe the large number of consumers in the south part of town at that height.

Q. You don't supply any of them on that high service system out of the 30 inch pipe south of Poppleton Avenue do you?

A. But we have laid another large one on 20th Street.

Mr. WRIGHT: I move to strike out the answer as not being responsive to my question, and I ask that the witness answer the question.

The WITNESS: What is the question, please?

Q. (Read.) You don't supply any of them on that high service system out of the 30 inch pipe south of Poppleton Avenue, do you?

A. South of Poppleton Avenue?

Q. Yes sir.

A. Why yes, we supply all of that 10th Street District that is south of Poppleton Avenue.

Q. But you don't supply it out of any 30 inch main?

A. But you are drifting from the high service to the low service—out of the low service pipe line, no.

Q. You do supply it out of this low service north of Poppleton Avenue, where your pumping station is?

A. Supply it out of the low service, yes.

650 Q. But south of Poppleton Avenue you don't supply any high service out of the 30 inch pipe?

A. We couldn't supply high service out of low service.

Q. You can do it by pumping from the Poppleton Avenue Station?

A. Then it is high service.

Q. But you supply it then out of low service pipe?

A. Low service becomes high service the moment you start your pump if there is no outlet for your water.

Q. Is there any high service connected anywhere with this pipe south of Poppleton Avenue?

A. Pipe on 24th Street?

Q. I ask you if there is any high service connection made with this 30 inch pipe south of Poppleton Avenue, north of the South Omaha city limits?

A. Yes, two.

Q. What are they?

A. One 12 inch.

Q. Where?

A. And one 16 inch at 24th and Vinton, and one 12 inch at Poppleton Avenue and 24th Street. There are check valves on there, so in case of anything happening——

Q. You can connect the two systems together?

A. They are connected.

Q. Is there a connection on this 12 inch pipe where it crosses the 30 inch pipe at Vinton Street?

A. No. One runs over or under the other but there is no connection.

Q. Any connection on 24th Street between Poppleton Avenue and Hickory Street?

A. I just told you there was one here by check valves, (Indicating).

Q. That is at the crossing of Poppleton Avenue and 24th Street?

A. Yes.

Q. But I am referring to that? (Indicating.)

A. Only at 24th and Vinton.

Q. But you just told me that there was no connection between them at Vinton and 24th, that one ran under the other.

A. No, you were asking about this red line that runs to Krugs.

Q. But with the high service system is there any connection there at all?

A. Yes, there is a 16 inch there. That is what we call a "run-around" through a valve.

Witness excused for the present.

At this time, by agreement of all parties, the further taking of testimony was adjourned until 2 o'clock p. m. "tomorrow", April 3, 1906.

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2 O'CLOCK p. m., April 3, 1906.

Parties met pursuant to adjournment, at same place.

Present: John L. Webster, Esq., Solicitor for complainants. R. S. Hall, Esq., Solicitor for defendants. Charles W. Pearsall, Examiner.

Further proceedings were as follows: ALONZO B. HUNT, witness on the part of defendants, is here recalled for further direct examination by R. S. HALL, Esq., testified as follows:

Q. Mr. Hunt, were you with the Water Company at the time the riprap was built on the east side of the basins there, and on the west side of the river?

A. At Florence?

Q. At Florence.

A. Yes sir.

Q. You may state, Mr. Hunt, how that was built, and the circumstances surrounding it.

A. The circumstances surrounding it was this—that the river at that time was cutting in badly, cutting in on to the Nebraska side and opposite our basins.

Q. Before we get into that, Mr. Hunt, at that time how far had the basins proceeded with their construction?

A. They were all excavated and they were commencing to put in the walls in one or more of them, and the sewerage to drain them and clean them.

Q. Now at that time the river started coming in, and you may state just what occurred and proceed with your statement in regard to the construction of the riprap there.

A. As soon as the river started to cut in and we saw that our banks were becoming endangered there we started riprap work, bought willows to make mattresses, and stone for riprap and weighted them down, and commenced putting the riprap work in by laying layers of willows, alternate layers of willows tied together by wires and cables, and stone between them—between the layers. We kept on building that and lowering it down until it reached permanent bottom, rock bottom.

Q. What you call bed rock?

A. Bed rock. That is, a portion of it reached bed rock. The north portion between Mill Creek and our lower crib—our lower intake crib. Between those two points the rock in the river is very much nearer the surface than it is either north of that point or south of it. Part of our riprap work south of the lower intake crib has not gone down to bed rock, in every instance. It has at some points and at some points it has not.

Q. From what points along the river did that riprap work ex-

tend, what was the most northerly point and what was the most southerly point?

652 A. The most northerly point was about 300 or 400 feet north of where Mill Creek empties into the Missouri River and that is at something like 600 or 700 feet north of our Minnelusa pumping Station, and the lower point—the lowest point south to which our riprap extended, was a short distance south of our most southerly basin—settling basin.

Q. For how long did that work continue there, Mr. Hunt?

A. For about two years and a half it was continuous. That is we had 50 to 75 and sometimes more than that, loads of stone come in in one day, have nothing but a full train load—nothing else come up but stone. They would back in and run down on to the side track that we had built on the lower bank that we were protecting, where formerly the "M. & O.," railway track was built, and had been washed away, and we would run our train of cars down on that and unload it, and the next day the railroad company would bring in another train load of stone and they would pull out the empty cars and run the loaded train in and we would unload that—and that was repeated every day, day in and day out.

Q. Day after day?

A. Yes, even Sundays, we worked there continuously.

Q. Could you give any idea of the number of men that were employed in that work? How many men did you have there unloading the riprap—handling the riprap, including the gangs that were cutting the willows and bringing them by boat or whatever way you did bring them in?

A. They varied, but we had from 300 to 600 men working. They might not all be working continuously on riprap work. For instance if we disposed of a trainload of stone before the next one came in we might take them off and work them on grading down the side of the banks, preparing for the willows, and riprap would go in the following day or the following week, or we might take some of them off to do other work temporarily.

Q. In what way did you get your willows to the work?

A. We brought them from across the river—from the Iowa side, a great portion of them. We took all of that strip of willows from the bend in the river up where the Government crib is now located to three miles below. Stripped the whole growth off an area there of we will say 4 miles long by three or four miles back to the bluffs. That was all covered with willows, and that was all stripped and used in this construction. We were a year and a half, nearly, getting the willows off of that. Then we bought willows all the way up the river from everybody we could buy them from, and brought them down by train loads, clear up as far as Blair we bought willows. We didn't buy anything below because we couldn't come up the river, but we bought them up the river and brought them in by train loads, and where it was only one or two or three miles we brought them in by wagon.

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Q. What do you mean by "couldn't" come up the river?"

A. Because the current was so strong we couldn't come up the river.

Q. Do you mean by boat?

A. Yes sir, we had a steamboat built for that purpose, belonged to the Water Company: In addition to this work I speak of, the willows and stone, we put in—the Water Company put in cribs.

Q. State how those were constructed.

A. Those cribs were built in what is known as cob house form. They were built by using 10 x 10 timbers and putting them together in block house form, and spiking down every piece of timber on to the next one below it, building up in a solid block form and putting in cross-ties at every eight feet apart. Those cribs were run from 300 to 500 feet in length, running in an angle of about 45 degrees to the river, angling down stream in order to turn the current out and prevent it from scouring away the banks below wherever those cribs were built, and also for the purpose of warding off the heavy floats of ice that flow down every year when the Missouri breaks up.

Q. How were they filled?

A. Those cribs were filled full of stone. There was no brush put into the crib. It was simply stone—what is known as riprap stone, and stone that one man could handle.

Q. How high were the cribs?

A. They varied according to the depth of the bed rock. Those cribs—the river end—the east end—is all lying on bed rock. The company washed out the mud by hydraulic pressure, used a pump and very high pressure to wash the mud out until they get it on to bed of rock, and then it was filled with stone.

Q. Take it on the river side, about how high would they be?

A. I don't understand what you mean by the "river side".

Q. I mean at the eastern end, the end that projected out into the river.

A. The eastern end would be very nearly the same height as the western end, as the crib was supposed to build up level.

Q. I was trying to get from you the approximate size of the cribs. You said they varied.

A. The crib would be from 300 to 500 feet long, by 30 to 35 feet in height, by 10 feet in width.

Q. How many were there of those, do you remember?

A. There are 10 or 11, I think. There should be 11.

654 There are only 10 shown on here (Exhibit 7) 10 is correct, that is right.

Q. I see this map, Exhibit 7, was made in 1891. Do you know whether any of the cribs were put in after that?

A. No, there were no more cribs put in after that. The cribs were all completed before the balance of the riprap work was all completed.

Q. Several of those cribs were joined together and called the main crib, I believe, were they not?

A. I forgot to describe that. That was a special crib that I haven't taken into this at all. There was a crib that was built for an intake. It was really a block house built of white oak timber,

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12 x 12's, 18 feet long. There were two of those built and they were dovetailed and built precisely as an old fashioned block house was built. They were built tight, the joints of those timbers. It was squared timber and they were built so as to keep out the water and they were caulked the same as you would caulk a vessel, with oakum, and are in fact water tight. There is a valve cut in the front side a good deal like a window, with a steel cap and slide in it, and a valve provided for it, and it can be closed down and notwithstanding that the water is clear up almost to the top of that it doesn't admit any water when the valve is closed. You can pump the water out and go down to make any repairs that might become necessary in the valves and screens that are in there to prevent the valves from clogging on the low service pumps.

Q. Had there been any threatened cave-away of the bank before that riprap work was commenced, and if so you may describe the nature of it.

A. It wasn't only threatening, but it did cave away. It washed out at the point where the bed rock was about 16 feet below the surface of the ground, and that was just below Mill Creek. The river set in and commenced undermining that and it caved off at the rate of 20 to 30 feet a day encroaching in on the grounds on which our pump house is located.

Q. I have in mind a cave-in which occurred down near the basins. Do you remember about that?

A. That was later on. That was after a part of the riprap had been put in, and the cribs put in, and there was an intervening space between the lowest crib, the furthest south, and the next crib north of that. It hadn't been completed, and the river was coming in there, and was undermining more than we knew of, and the basin that has been very nearly constructed—one of them had been very nearly finished, the construction—and the bank caved in, and very nearly took the basin in, but didn't quite.

Q. How far was that cave-in from that basin?

655 A. From that basin, it was directly opposite that basin, east. It caved up in to within 50 or 75 feet of the basin.

Q. How was that particular thing made, Mr. Hunt?

A. It was made by finishing the riprap work, making the job complete—the intervening space I speak of—building up the riprap, and by putting in a wall down below the basin to replace that which had slid out.

Q. After you had finished this riprap work, and at the end of the two years and a half work, you may state whether there has been any change in the bank in the way of sliding or caving way, or whether the riprap has stood?

A. The riprap has stood and has not settled any. We took soundings every year, and it has not settled any, and there has been no wash in there since, and no caving in or settlement of the basins.

Q. How long has it been since the riprap work was completed, just approximately. I don't ask you exactly, but approximately. It has been over 20 years hasn't it?

A. It was completed when the works were opened—now what was

that—1889—1888—no, 1889, that's right, 1889. There was very little done after that.

Q. Well, anyway, for the last fifteen years it has stood absolutely with no change?

A. Absolutely no change, no settlement whatever. Our levels show that the riprap—that the level of the riprap now, is what it was at that time.

Q. Mr. Hunt, in this connection, I desire to ask you what was the particular reason that the Water Company chose Florence for this pumping station?

A. They chose Florence for two or three reasons. One reason was that there was a permanent rock bottom there opposite Florence, very near the surface, nearer than at any other point either above or below Florence now.

Q. Isn't it true that—

A. (continued.) —and also for the reason that the City of Omaha had commenced to empty—the City of Omaha had grown north, and the city had commenced to make sewers, to put in sewers to empty in above the original pumping station at Burt street and the Water Company had to go far enough north to get beyond any possible growth that the city might extend further north, because of the sewerage.

Q. Isn't it true that that point at Florence is about the only point between Fort Benton and St. Louis that has not changed in the last 50 years, as shown by the surveys of the Government; wasn't that known to the Company?

A. Of my own personal knowledge I don't know, but it is true that the Government surveys show that that has been a permanent point and is a permanent point.

656 Q. Mr. Hunt, from your knowledge of the situation, you may state whether or not that protection was or was not absolutely necessary there for the preservation of those basins and the water works site?

A. It was absolutely needed. The works couldn't have been maintained there without putting it in, not permanently.

Q. What would you say, Mr. Hunt, as to the character of the work done on the east side of the river, the riprap protection there?

A. Well that was also necessary. We got the best engineering advice that we could get in the country before we started in to do it, and we all agreed that it was absolutely necessary that something be done there, or the river would recede from the west side and leave the works without water. It was cutting in and cutting very rapidly on the Iowa side.

Q. What would you say as to the permanency of the work done there by the Water Company, as to whether it was well done, and whether it stayed?

A. It was well done and stayed.

Q. It is there yet, isn't it?

A. Yes sir.

Q. What is the test, in your opinion, of work of that kind, as to whether it is good and sufficient for the purpose for which it is designed?

A. The test is whether it stays after it is put in, and some of this has been in 12 or 15 years, and is there yet, and that is pretty good evidence that it is good work.

Q. The testimony of Mr. Fox, in this case, has been taken about there being some standard of work, and that any work which is not of that standard is useless, and to the effect that any work that is of that standard is good if it comes within that standard whether it stays or not. What have you to say about that?

A. My idea of standard work is work that when you put it in it stays there; not work that goes out. Mr. Fox's work, wherever it was put in went out, and I don't consider that standard work, nor good work. You can't show me one place where our work has gone out so far, and I think that comes pretty near being standard work.

Witness is excused at this time, it being understood and agreed that he will present himself for cross-examination at a later date, if the complainant so desires.

E. M. FAIRFIELD is here called and sworn as a witness on the part of the defendants. Being examined in chief by R. S. Hall, Esq., he testified as follows:

Q. You may state your name?

A. E. M. Fairfield.

Q. Mr. Fairfield do you know the station of the Water
657 Works plant, at what is known as the Burt Street station, the river side station, or river station?

A. Yes sir.

Q. Were you acquainted with that before you became manager of the Omaha Water Company?

A. Yes, in a general way.

Q. For how long a time have you known of the fact of the possession of the Omaha Water Company of that property, and the nature of that possession?

A. Well, I should say since 1881 or '2. Do you want me to explain how I know it?

Q. Yes, you may explain how you know it.

A. I was down there in one of those two years, at the time the basins were being constructed, not from any interest of mine in the water works at all, but merely as a visitor. I know it was before September, 1882, because in September, 1882, I went away to school, went away to college and didn't come back here until after the work down there was completed.

Q. When did you see it again after 1882, Mr. Fairfield?

A. Well, probably not until 1886 or 1887, along in there some time.

Q. When you saw it in 1886 or 1887, say 1887, was the fence which Mr. Hunt testified about, which is marked on Exhibit 6, was that built there then?

A. Oh, I can't remember details as to that. I simply visited that place by walking down the tracks as far as I could there, I was with some other young fellows on a Sunday.

Q. When did you have your attention directed particularly to those works—any time before you became manager of the Company?

A. No, not in an interested way, no.

Q. How long have you been manager of the Company, Mr. Fairfield?

A. Six years.

Q. Do you know the nature of the accretion there?

A. Yes, to some extent. I have observed it from year to year.

Q. You may state, referring now to Exhibit 6, how far that extends out in the river from the bank, as is shown there on this map, Exhibit 6?

A. Well, the net accretion is something that I could only guess at. Of course it has been a variable quantity you might say; some years there would be a very wide stretch of made land out here, and then the current would come in and take away a part of it. That wouldn't be considered accretion I suppose; but the permanent addition—at least that portion that has been permanent during the last 6 years, I should say ran out 400 or 500 feet or more east from the railroad tracks there.

Q. At what point?

A. Well, in the neighborhood of the north red line shown on that exhibit.

Q. Did it preserve the same width all along or was it narrower at some places than at others?

A. It narrowed down to a point about opposite—about east of the pumping station. It made a triangular piece of land beginning at a point opposite the pumping station and spreading out northeast and northwest through this width, to the base line you might say of 100 or 500 feet.

Q. Referring now to Exhibit 6, Mr. Fairfield, you may state, during the time you have been manager of the Omaha Water Company, whether you know what has been the nature of the possession of the Water Company of the property included within the red line marked on the exhibit?

A. Why it has been absolute occupation. We certainly exercised the rights of ownership. We have occupied it exclusively, and no one has ever questioned our authority to do so. We have stored material on all parts of it except possibly some of this accretion out on the north part, excluding the railroad right of way of the Union Pacific or whatever road owns that—I understand it is the Union Pacific.

Q. During that time you may state whether or not that has been fenced.

A. It has all been fenced except along the tracks on the river front, I believe. I might make one further exception, and that is, that the fence along east of the tracks into the accretion has on one or two occasions, I believe, extended out to a point where it was the next year carried away, a part of it. But there was sufficient fence there to mark the boundary line.

Q. During that time have you had a watchman there?

A. Yes sir.

Q. You may state whether or not you have exercised full control of that property during that time?

A. We have.

Q. How long, Mr. Fairfield, have you been acquainted with the cities of Omaha and South Omaha?

A. Well, with the city of Omaha since 1880, and with the city of South Omaha since 1885.

Q. You may state, Mr. Fairfield, so far as you know, the growth of the City of South Omaha, and Omaha, and how they are divided?

A. The city of Omaha has grown in the main north and south along the river. It is a long, narrow—comparatively narrow—strip, occupied by the present limits. I do not recall

659 the time when the limits were enlarged to their present size. The limits as they now exist include a tract in the neighborhood of 8 miles long by 3 in width. North and south—that is the long axis, running north and south. The boundaries of Omaha and South Omaha are concurrent. That is, the south line of Omaha City is the north line of South Omaha city. South Omaha, as I recall it now, was started by the establishment of stock yards there in 1884, or possibly a little before that. I don't think—although I am not quite sure—that the incorporation of the town followed immediately although it may have. At any rate for a good many years, I should say for 18 or 20 years anyhow, the two municipalities have joined each other as I have described. In fact ever since South Omaha was incorporated. I don't suppose my testimony is the best evidence on anything of that sort because the plats would show for themselves.

Q. Referring now to the Florence ground. How long have you been acquainted with that. I am speaking now of the ground of the Omaha Water Company up there.

A. Since the time the Water Company began its first work up there.

Q. Do you know how long that has been under fence by the Water Company?

A. No, I do not. I haven't any personal knowledge of that.

Q. How long have you known it to be under fence?

A. I have known it to be under fence for—well over 10 years anyhow, probably 15. I used to be out at Florence a good deal.

Q. Are you acquainted with the 25 acres near Krug Park, Mr. Fairfield?

A. Yes sir.

Q. I wish you would state what the utility of that ground is for the Water Company?

A. Why its utility consists, in addition to its area for the purpose of building reservoirs, in its elevation above the river, being the highest point within any reasonable distance of Omaha, of sufficient area for the purposes of reservoirs, large reservoirs. It also possesses additional value over any similar elevation in the fact that the hydraulic grade line from there to Walnut Hill, and below, is very uniform.

Q. I wish you would explain, Mr. Fairfield, in what way that would be advantageous?

A. Well, it is always good practice to get a uniform grade line if you can. Of course there wouldn't be any difference in the static head, static pressure, between two elevations of the same height, whatever the difference in their grade lines but the dynamic pressure, the flowing pressure, would differ materially, if, for instance, you had to cross ravines. A uniform grade line is of considerable advantage in that way.

Q. By dynamic pressure you mean the pressure when the water is in motion?

A. The pressure in motion. It is spoken of as flowing pressure.

Q. And the loss is caused by what, Mr. Fairfield?

A. Loss is caused by friction.

Q. What would be the difference between pipe laid on the level in that respect, and pipe that had to go up and down elevations?

A. Many bends in the pipe would increase friction.

Q. You may state also, Mr. Fairfield, whether any other difficulty enters into the lack of a good hydraulic grade in transporting water?

A. Well, the formation of air pockets in the high points, if a pipe bends upward and then downward it leaves a place for the air to accumulate—there is always air in water and it will accumulate if it is given any provocation. It decreases the diameter of the pipe necessarily and restricts the flow to some extent. Also is the cause frequently of water hammer.

Q. Mr. Fairfield, you have examined the situation with reference to this 25 acres have you not?

A. I have, yes sir.

Q. Do you know of any other piece of ground of a size sufficient to establish such basins as would be required by the Water Company in case such extension was made, that could be found anywhere around here, besides that 25 acres?

A. No, I don't know of any within any reasonable distance of Omaha.

Q. When you say that you don't know of any, do you mean that there isn't any?

A. Yes, I am confident that there isn't any.

Q. It has been stated in the bill brought in this case that the mains of the Omaha Water Company have been unduly increased because of the necessity of supplying South Omaha with water. What have you to say about that, Mr. Fairfield?

A. I would say decidedly that it is not true; for several reasons—if you wish me to go into them.

Q. Yes, I wish you would state the facts about that.

A. One reason is this; that a city occupying such a territory as I have described, running from north to south, with the additional fact that the chief pumping station is two or three miles north of the north line of Omaha, makes it necessary and inevitable that the main arteries of the water system shall run north and south, or with the extension of the city. This, of course, requires no demonstration. Your water mains would follow the plat of your city. As you get farther away from the pumping station the mains should be larger in proportion because your pressure is growing less,

particularly when there are high elevations on the line, as there are in the 30 inch line to South Omaha. It is necessary, in other words, to carry a large volume of water to points which are distant from your source of supply, and to points where the flow line is not very far below the surface, as you might express it. In other words the location of that 30 inch line at high points means that it is little more than flow line; that is, if the pressure is insufficient to raise water to any considerable height. It is necessary therefore to have your mains of ample size. I do not consider that they can be too large within the limits of fraudulent construction.

Q. What do you mean by "within the limits of fraudulent construction"?

A. I mean if construction is undertaken in good faith with good engineering advice there is no such thing as too large a main.

Q. There is no such thing except as far as it relates to the question of expense, is there?

A. That is all. Another consideration that enters into this large main is this: South Omaha was growing up on the south, Omaha was growing down to meet it. The necessary and inevitable conclusion was—must have been, that the two towns would meet, just as they have met; that Omaha would grow solidly down to the South Omaha line. That meant that there would be a large population to serve at a great distance from your pumping station. Without any regard to South Omaha, whatever, that is, without any regard to the supplying of water to South Omaha, there is no excessive size in the 30 inch main which runs to that city. You cannot disregard the expanse of South Omaha, of course, because that was one of the factors in the growth of Omaha in that direction. In other words, the question is not, as I understand it, what would have been proper if South Omaha did not exist and had not existed, but what would be the situation if South Omaha did exist, just as it does exist and was supplied with water independently. There is another factor that I might mention, that should contribute in a problem of that sort. That is this: The fact that the line of the south limits of the city crosses several railroads, which are sooner or later the site of various industries, large and small—to provide against any probable supply of water that might be needed.

Q. You may state, Mr. Fairfield, whether it would be good economy in building into a growing section of the city, such as you have described, to put in small pipes?

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A. It is not good economy. The question to a practical water works man is not how small a pipe you can get along with, but what is the biggest pipe that he can afford to put in under all the circumstances.

Q. Take the 30 inch main from Poppleton Avenue down to Boulevard—I think is the street there—do you know how many consumers take from that?

A. No, I do not. We have no means of getting at that without a great deal of search.

Q. Without going into your books, I am speaking of your personal knowledge—do you know how many take from that?

Q. I can't cite you to a single case by name and number and so on, but I do know there are quite a number because the matter has come up to me from the service department in the last few months, about several services that are on that 30 inch main; just happened that way that the service department comes to me to discuss certain services at different times for one reason or another, and I remember that several of those in the past winter have been services on that law service main south of Poppleton. I cannot put my finger on any particular one without considerable research. There is another item that might come in there; that this low service line affords the opportunity to supply railroad services there at a comparatively cheap low service water in large quantities for filling of their engine tanks.

Q. You are well acquainted with the Poppleton Avenue station, are you not, Mr. Fairfield?

A. Yes sir.

Q. And know its relation to the system generally?

A. Yes sir.

Q. Some claim has been made that the Poppleton Avenue station has no practical value to the plant. I wish you would state what function it performs, and what place it holds in the water distribution of the company?

A. It is a high service station which takes the water from the service main at that point and pumps it at an increased pressure into the high service district. Performs the same duty as the Walnut Hill station, in the same district. It is a duplicate high service station, in other words. If anything happens at Walnut Hill that would make it necessary to close down, you can supply the same district from the Poppleton Avenue station.

Q. How would it be in case of a large fire in the high service district?

A. It would have the same value as Walnut Hill, and an additional value depending upon the location of the fire.

Q. Just state in what way that value would rise. How would it rate as a practical question?

A. If there was a large fire nearer Poppleton Avenue station than Walnut Hill station then you would get a better service by operating the Poppleton Avenue station because you would not have to pump the water so far.

Q. Suppose there was a large fire upon the high ground surrounding 10th and Bancroft, or upon the Kountze Hill, would that be a case in point?

A. That would be a case in point, yes sir. Poppleton Avenue is, I should say at a venture, 2 or 3 miles nearer that point than is Walnut Hill.

Q. Would it be good economy in handling the service for the city to have no station such as Poppleton Avenue station?

A. I cannot believe it. We would certainly hate to give up Poppleton Avenue station. I don't see how any one could that wanted to have ample margin of pumping capacity.

Q. You regard Poppleton Avenue station then as a reserve?

A. Yes sir.

Q. And a reserve called for by a reasonable measure of safety?

A. I do, yes. It must be remembered that Omaha is built on quite a variegated contour. It is not practicable to have a half a dozen different kinds of service—to have zones of service, in other words. You have got to supply the high service to districts in which perhaps one part would get only 30 pounds pressure and another part would get 130 pounds. This makes it more advantageous to have two stations in different parts of that district in case of emergency.

Q. I do not think of anything more. Is there any other subject, Mr. Fairfield, that you want to be heard on?

A. I might say simply this, in reference to the size of the mains. Any experienced water works man considers it a cause for great congratulation, self-congratulation, and that of others, if his system contains much large pipe and little small pipe. I never heard of such a thing among water works men as deploring the excessive size of any main. I think we would all be glad if we could have our mains 30 inches, even if we wouldn't need them in a hundred years.

Witness is excused for the present, it being understood that he will present himself for cross examination at a later date, if complainant so desires.

Afternoon Session, October 21, at Minne Lusa Station, Florence.

WILLIAM A. UNDERWOOD, having been first duly sworn, testified as follows:

Examination-in-chief.

By Mr. HALL:

Q. You may state your name and place of residence, Mr. Underwood?

A. William A. Underwood; City of New Jersey.

664 Q. Were you, at any time, Mr. Underwood, connected with the American Water Works Company, or with the company which preceded it?

A. I was. American Water Works Company, an Illinois corporation; previous thereto, the City Water Works Company of Omaha. And then, succeeding, I should say, succeeding the American Water Works Company of Illinois, the American Water Works Company of New Jersey.

Q. You were connected with all those companies?

A. With all those three.

Q. You may state to the commissioners the nature of your connection with each?

A. I was president of all three companies during certain years.

Q. What was your first connection with these water companies?

A. I was present and helped, assisted in the purchase of the stock of the City Water Works Company—five-eighths of the stock of the City Water Works Company, in July of 1886. That was transferred on the first day of September of 1886 and I then became a Director in the City Water Works Company and its President.

Q. At the time that you first became connected with the City Water Works Company what plant did that Company have?

Mr. WRIGHT: I presume all this testimony will be taken subject to any objections which shall be argued as to the material bearing on this.

Mr. HALL: I didn't quite catch that.

Mr. WRIGHT: I want it understood that this testimony as to the former companies is objected to on account of its immateriality. I don't want to make the objection to each question.

Mr. HALL: You want the objection to this whole line?

Mr. WRIGHT: Yes, so it will be understood and taken up when the argument is made. I presume that might apply to all testimony introduced, as it will have to be introduced before the Appraisers; the question of its materiality or its bearing could be made when we come to argue the proposition, if that is agreeable.

Mr. HALL: Any way you want that.

Mr. MANSFIELD: In other words, what you wish is that through evidence you shall not be taken to have admitted the materiality of the testimony?

5 Mr. WRIGHT: Yes, or competency. That is what I understand, as it is in the equity court practice.

(Question read to witness as follows:)

Question by Mr. HALL:

Q. At the time you first became connected with the City Water Works Company what plant did that Company have?

A. It had a pumping station on the river front in the City of Omaha, near the Smelting Plant; just above the Smelting Plant. It had a reservoir on Walnut Hill, and it had distribution mains throughout the city. There was one main leading from the pumping station which supplied the City with water, crossing the Union Pacific Yards, a sixteen inch main; and the number of miles of pipe and the sizes of them I could not tell, except to say that this sixteen inch main ran from the pumping station, under the tracks, across the yard, and then up into Cuming Street, and up Cuming Street to about the corner of 18th or 20 Streets, and there it went into a 20, I think, and went up the hill part way and then into a 24 until it got out opposite the reservoir, and there, then into a reservoir, was a 36 again. The distribution system was connected with that main, and, of course, as I have said, the reservoir. That, in general terms, was the system.

Q. Was the basin at Walnut Hill substantially the same as it is now?

A. Substantially, yes. The outlet and inlet have been enlarged.

Q. But the basin, itself?

A. Was substantially the same.

Q. At that time what position did you occupy in the Company with reference to having the management of it out here?

A. Well, nothing; no particular duties in that regard. I was the President of the Company. I looked after, in a general way, its

legal affairs, and its meetings, and things of that kind at that time. Mr. Wiley was the Manager, local Manager.

Q. When was it that it was decided to erect the plant and station at Florence?

A. I think when I was there in 1886, Mr. Wiley and myself came up to Florence. There was a good deal of complaint in town, of want of pressure, and that the small basins that were at the old pumping station were not adequate to do the work that was being put upon them, and we came—we looked all over, investigating all sorts of water supply and basins and one thing and another of that kind. I went with him.

Q. For what purpose did you make that investigation?

666 A. For the purpose of seeing where we best could go and could get the best supply of water, permanently, at a reasonable cost.

Q. What can you say as to what discoveries you made with respect to finding a place for [—] permanent water plant?

A. There was nothing except Florence until you get seventeen or eighteen miles up the river, if you went on the Missouri River.

Q. What did you discover about the peculiar conditions surrounding Florence that made it the only available site, as you have indicated?

A. Well, if you go below Florence, when you get down three-quarters of a mile or a mile from where we are now, down beyond, below the present basins, the river begins to bend off to the east; a big bend; as I understand it is about eighteen miles around to the City. And it was bottom land, and would have to build a heavy building for heavy machinery on that bottom; and basins on that bottom land; and with no security but what the river would leave you some time or another. There were several old river beds in through there, and nobody could afford to chase up the river over this wide bottom, with a forty inch main.

Q. Now, what conditions did you discover which stood for permanency here at Florence?

A. Rock ledge crossing the river right at this point, and, as I believe, this and one other point are the only points between just above St. Louis and Fort Benton; a rock ledge crossing the river close to the surface. That was the particular idea. There were suitable grounds for basins, either just north of the plant or just south, which were elevated above the water in the river even at high water; and there never—there was no sign, I should say, of any slides along that bluff anywheres, nor was there any appearance here of the river ever having changed its course.

Q. What investigation was made at that time with respect to sounding the river in connection with that location?

A. There were some soundings taken to see how deep it was to the bed rock. They found the bed rock right here on the river.

Q. Who made the soundings, if you know?

A. They were made under Mr. Wiley's direction.

Q. Did you see them made?

A. I didn't see the man out sounding in the river.

Q. Do you know who make the [surroundings]?

367 A. I don't. But there were soundings. They were only, at that time, quite superficial. I don't mean to say a thorough set of soundings were gone into; just simply to find out where the rock was.

Q. Subsequently were soundings made?

A. Captain Rugar made a very thorough set of soundings, and then afterwards, some made I don't know anything about.

Q. Did those soundings made by Captain Rugar confirm your view?

A. Yes.

Q. Who was Captain Rugar?

A. Captain Edward Rugar's home was in Janesville, Wisconsin. He had been a civil engineer before the Civil War and had entered the army and had been taken as a volunteer and taken into the Engineer's Department and become Chief Topographical Engineer of the Army at Cumberland. Then, after the Civil War he became a hydraulic Engineer and he was known to me at that time as a very thorough workman and would not do anything that was not a good job.

Q. Was he employed by the Company?

A. He was.

Q. At what time?

A. In the fall of 1888.

Q. Now, do you remember when the work was commenced here at Florence?

A. The fall of 1887.

Q. What connection did you have with it?

A. Well, we had, the Board had determined to do this work out here; put in a pumping station. Mr. Wiley had procured the plans for this building as it was without the boiler extension—the extension to the boiler room, I mean; and without this room that we are now in; and had begun, when I came out here the next time late in the fall of 1887 after we determined to do the work he had begun the excavation for the building.

Q. Calling your attention, Mr. Underwood—

A. Mr. Hall, there is one thing perhaps I should say to you before. We examined into the site of the old station as to whether we could increase the capacity of that station and use that. I think it was ninety feet to the bed rock at the old station, and it was all sand and loose river-wash. No foundation for heavy machinery we felt was safe; and Mr. Wiley and I went down to Kansas City to see a basin that has been built by the National Water Works Company in the river bottom, I think, an engineer named Pearson; and we found that one corner of it had dumped in. They had built it on the river bottom and the water was so close to the surface of the ground in the river bottom that they could not make a part of the basin underground, so they attempted to make it all above ground, and that loaded it, the load of water in it loaded it so there was a sink took place there, and it convinced us that we could not trust the river bottom with any basins.

68 Q. Wasn't it also true that the city sewerage also would get in?

A. I will get to that. The next thing there was a clamor to put in a sewer just above the site of that station, and during the time that I had been President of the Company until then we had fought it off, threatening to bring an injunction suit, that they were turning sewerage in. The City was growing rapidly in this direction. Then, the next thing, the river threatened to leave us there, and a bar appeared to be forming out in the river and would leave one of these, what they call "lakes"; and we would have to chase that up, wherever the river might be, if we went there.

Q. Mr. Underwood, calling your attention to B-300, 311-312, 313 and 314, the blue prints—there are four of them—I will ask you whether you recognize those as being blue prints from the original drawings?

A. They look like it. Of course, after fifteen or sixteen years I don't pretend to say all the lines are exactly as they were, but they are apparently.

Q. Now, during what time was that building being erected; how long did it take to build it?

A. That building was commenced in the fall of, the excavation commenced in the fall of 1887. I came here once or twice in the meantime, but came here in August of 1888 and it was up about half way the height of the windows on the lower floor; and we finished it and set the large Holly Pump to work on the city service the following June or July, of 1889. July, I think it was. In July. And also one of these low service pumps; I think the farther one of the two that sets in that room. We took water from the river and the Holly Pump, or Gaskell, perhaps, more technically called, we set to work on the river service, and that night I made the contract for the first of the big Allis pumps; the night we set the Gaskell to work.

Q. During the progress of the construction of the building were any photographs taken of it?

A. There were.

Q. Have you one here?

A. I have seen one here.

Q. Calling your attention to that photograph—

A. Yes, that was taken.

Q. That correctly represents the construction?

A. Yes, it does.

Q. At that time?

A. Not at the time I came here in 1888, in August of 1888. This was taken, I should think, sometime in October, 1888.

Q. But, generally, it represents the course of construction?

A. The building in course of construction.

669 Mr. HALL: I will offer that in evidence, showing the building in course of construction. Exhibit 1001.

Q. Now, were any pictures taken of the basins during the course of construction, Mr. Underwood?

A. They were.

Q. Showing you this book of photographs I will ask you to call

attention to the photographs which show the process of construction, to your knowledge, taken at or about the time?

A. Well, these two large pipes that you see in each side of the basin, thirty-six inch mains, cast iron, and are laid through there so that if that basin is out of commission for any reason, so that the water does not flow into it, and then flow out at the lower end, that the water can be drawn through by the mains and that you can make your repairs to the basin without disturbing the system. The basin is number 3.

Q. How many basins are there, Mr. Underwood?

A. There are five besides one they call B—a little one which is just simply put in there to get another overflow.

Q. Under what system were those basins constructed?

A. The bottom of the basin, as you will see in another photograph here—you had better mark that as 1002, this first one.

Mr. HALL: I am going to get all three of them there; I think there are.

Q. Exhibit 1002, is that a correct representation of the process of construction at that time?

A. According to my recollection. The bottom of the basins was constructed in a series of ridges; a series of ridges and depressions, so that mud would not lodge and keep, to any great extent, on it; and in the depressions valves, mud valves were set. There is one. And it is about seven feet from the top of the ridge to the bottom of the depression. Those are quite sharp, those ridges are through there, and these mud valves operate from a high service, as under about 120, or whatever the pump is carrying, pounds pressure. It runs all around, a six or eight inch main, all around the basins, and you can see there is a cylinder on top of the valve. The valve is a flat valve.

Q. What basin are you referring to, what exhibit?

A. That is 2, but they are all alike.

Q. Basin 2, Exhibit 1003?

Mr. BENZENBERG:

Q. Is the construction of all the basins alike?

A. Practically. The bottom of the valve is a disc that sets down on to the—to a plate here, with a hole in it, that leads into a cast iron pipe; and the basins are underlaid, all except Number 1, with cast iron water pipe, 12 inch, which in turn discharges into a 36 inch cast iron pipe, and so into the river below the intake. And when they want to open a valve they go upon the bank here, turn a cock which lets 125 pounds pressure of water down here, and shoves a piston in this cylinder; and this may be all covered with mud; may be seven or eight or nine feet of mud in there; and that shoves it up; opens a valve, and the mud and water gathered in the bottom run out; and when they want to close it down they turn the cock on another pipe running along parallel with it (it looks like one here on the photograph, but there are two of them), and it lets it into the top of the valve and that shuts the valve down; closes it again. When you get to the sides they are slanting upwards

until they get to within about nine or ten feet of the top, when they are perfectly perpendicular. That was Captain Rugar's design to prevent mud settling on the edge and then [*bring*] stirred up by the wind and wash-in; and also that was in case when it froze there would be water, perpendicular water, deep water over the side down here, that was under the ice.

We had an experience at the Walnut Hill basin, which was all like that, on a slant. The ice would pound, pound, pound, pound, and break up any kind of covering that there was on the slanting surface, and his idea was to have this perpendicular for eight or ten feet down and, therefore, prevent any such pounding and breaking up; and by cutting a hole in on the bottom of the middle of the ice you could always prevent the pounding the pipes.

Q. Calling your attention now to book 4, not book 4, basin 4, what does that represent, that picture?

A. Represents basin 4 during construction.

Q. Is that a correct representation?

A. Yes. This, I think, is after construction, or about the time it was finished. See, they are about to wash it out. I would say another thing about this method of cleaning out basins. To attempt to clean the mud which would gather in basins 4 and 5, anywhere in six weeks in the spring of the year—from six to ten feet deep, why to wheel it out by hand would be enormously expensive, and these basins 4 and 5 are about fifty feet deep, the two; the lower ones are 34 or 35 feet deep, and for that reason this method of draining or letting out the mud was adopted. Then, to keep them clean the sides of the basins are covered with eight or ten inches of concrete, and on top of that Portland Cement plaster; and two men on that with a hose wash it all off in three or four hours. You can see the men are there with the hose.

Mr. HALL: I will offer in evidence Exhibits 1001, 1002, 671 1003 and 1004, as showing the method of construction of the basins, and manner in which they are built.

Q. Mr. Underwood, you may state, if you will, what changes were made in the contour of the ground in building these basins?

A. Well, there was, between basins 1 and 2 was a very deep ravine. I say very deep—perhaps 38 feet; 37 or 38 feet; and that had to be filled up, and the water which would come from the west had to be taken care of, and that work was done; and then between basins 2 and basins 3 there was another ravine, not so deep, where the small basin B is now. That could not be built a large basin or put into a large basin because the ground was not all even, settlement with the original ground that had been there, so a small basin, to get another overflow, was put in there.

Q. In what way was this water taken care of?

A. Taken care of by running a cast iron 12 inch main around through the bottom of the ravine and taken down into the river between the basins.

Q. How deep down in the ground was that?

A. 38 feet, I think.

Q. And do you remember, could you state about how wide that fill had to be made thirty-eight feet deep?

A. Oh, I don't know. You can tell by the—it was very nearly to the edges of the basins.

Q. Now what was done with respect to the concrete foundations of these basins, and what was done in the way of making a firm bottom for them.

A. There was one thing came in, an element entered into it, as I said earlier, there was never any sign of any caving in of the banks, wash and slide to the banks here until after we began the work, and in the spring of 1888 or early summer of 1888 there began to be an appearance of sliding along the bluff, and very soon that developed, as the water went down, and it got worse until the bank had caved in perhaps three hundred feet from the edge of it towards the river, on the top towards the basin, two to three hundred feet. I am not accurate about the figures. This is a good many years ago, I am talking about, and I am not on the ground to judge about it now.

Mr. BENZENBERG:

Q. Three hundred feet along the line of the river or back from the river?

A. Back from the river two to three hundred feet, and that made, it made the river bank very precipitous down there. It was so that when I came here in 1888, came up here with Mr. Wiley, and 672 he had a place to dump the earth that he was taking out of the basins, the two lower basins, and he just had a platform built out from the top of of the bank, and a hole in it, and a wagon could go up and dump through that hole in the platform and drop into the water below, and wash right away, and was gone and it was a very alarming condition of things.

Mr. HALL:

Q. What was the alarming part?

A. The alarming part that that cave in would continue and that it would go back far enough, keep sliding and sliding; nobody could tell where it would stop. We would lose all the work we had done and our property would be in the river, real estate, and flowing down towards St. Louis somewhere. That was what was alarming us.

Q. How near did that come to the basins?

A. It came up to somewhere in the neighborhood I should say, 100 to 150 feet from the edge of the top surface.

Q. In what way did you meet that?

A. Mr. Wiley resigned and I telegraphed for Captain Rugar to come here, and that was the very first thing we had to think about, and it was not simply the problem of protecting this bank as the Government protects the bank, to prevent an overflow or prevent its washing away a little, but we had got to calculate with weight on top of the bank. On top of this bluff was a reservoir 38, 34 or 35 feet deep, and full of water—tremendous weight—and that we could not afford to have two inches settlement. Two inches would not cut a bit of figure with the Government; therefore we must load down at the bottom wide enough and heavy enough to prevent any sliding

out of the bank; and the slides we observed took place when the river was high, wherever there was a quick-sand and then, as it ran out, would soak the quick-sand with it, and down would go your bank. And we had got to stop any such action as that was. The result was that Captain Rugar went up above our ground here, just above the ground, and put in a set of cribs that stood at an angle with the current of the river, and then another one down below, and another one down below, and another one down below, and up at the upper one, which was bed rock, clean wash, bed rock, just as it is right opposite here. There were perhaps nine feet of water until we got down to the lower one, where it was fifty-four feet down to the bed rock, and on top of the bed rock was perhaps from six to eight feet of mud, and that was all washed out by means of a pipe and hose underneath the crib. Then he took willows, good sized ones, and wired them around and made bundles and laid those between those cribs as they stuck out there; laid these willows at right angles with the
673 current of the stream and then took another set and laid them at right angles with the first set and wired the two sets together, and then another cross-ways and backwards and forwards until he got four thicknesses of willows, or six thicknesses of willows, and then he loaded that down with stone until it sunk to the water's edge; then put on another set of willows; then he loaded that down with stone until it struck the water's edge again, and so on, until he got it built up just about to the top of high water; and the next year, in some places, that had settled down through the mud on the bottom of the river and then he filled up with stone. Then, along on top of this stone, opposite the basins, a wall some six feet in diameter, six feet thick, was built, and then I cannot tell you how many thousand yards of earth were put in between the edge of the top of the bank as it was and this wall, so as to bring the earth to a natural slope in there; and the earth and stone and wall and everything made it heavy enough to resist the settlement of the weight on top of the bank. Also it was tight enough after the first high water, the gumbo in this river settled in there and made it as tight as a bottle, and we never have had any trouble. You can walk along the top of the basins and see the coping stones and if there had been much of a settlement I guess you would see some broken stone.

Q. You were saying, Mr. Underwood, you could not tell how many yards were thrown into there. There was a great deal?

A. An enormous amount.

Q. If you could give the appraisers just some general idea of this amount?

A. When they go on the ground and see that wall there will be very—they can get a very good idea of just what had been filled in there.

Q. Can you point that out on the ground?

A. Certainly.

Q. Now, later on I will ask you to do that. Before, however, we do that I want to ask you whether there are some pictures here showing to some extent the nature of that riprapping work?

A. Yes.

Q. Are those correct representations of that part of that crib work?

A. I should say so, yes.

Mr. HALL: I offer them in evidence. Exhibits 1005, 1006 and 1007.

A. But even that don't give an accurate idea.

Q. It is only superficial?

A. To see them, to appreciate it, you can see them now out there and get some idea of what they were. The work on the other
674 side of the river did not have to be so particular as this because that is only to prevent the wash-away, and this here was to prevent slipping and also to take care of that weight up there.

Q. Now, in putting in the foundations for these basins, Mr. Underwood, how far did you go?

A. The foundations for the basins are simply the basins, bottoms of the basins. The basins are, I think, the two lower ones are either 34 or 36 feet deep and the three upper ones are 30 or 32 feet. That is my recollection. I am not exactly clear. It is a good many years ago.

Q. How did you finish the bottom of the basins?

A. I did explain it, how they are finished. In ridges in this way.

Q. That is not what I mean. The foundation itself, the concrete; how thick was it?

A. From ten to twelve inches of concrete and then covered over with a layer of Portland Cement. And then in a few places there were some cracks, developed, and, at Captain Reynolds' suggestion, we, I think, did something new in the shape of building a basin. We caulked this with oakum and they have stood there since; just as you would caulk a ship.

Q. Now, Mr. Underwood—

A. Small cracks; six inches, an inch and half an inch.

Q. Mr. Underwood, you have said that you can go out and locate generally this slide of the ground?

A. Yes; I would say one thing more before that. We found this sliding had taken place in the fall of 1888, and the first basin had been excavated about to its depth. I think it was excavated to its depth when Captain Ruger came here about the 1st of September, 1888, and he went on and began the concrete, the bottom of it. We were very anxious to get it into commission as early as possible and we were very anxious to get it concreted before the cold weather set in, because water was the best protection against frost, of anything we could have in the basin in the winter time. The first day that he was here, when we came up to Florence, we were examining down on the river bank and we found a tunnel had been built right between basins numbers 1 and 2 for drainage purposes—the two basins—a five foot tunnel of brick; and he and I crawled into that tunnel and went up in to the end of it and examined it and found it was about an inch flattened on the top. He was very much worried over that tunnel and the result was that the next morning he began
to put a 36 inch cast iron pipe into the tunnel; and he covered
675 that around with concrete, cement; laid in the best of cement; and which was afterwards the salvation of those basins. When the basin got perhaps five or six feet of water in, along in November, filling it very slowly, all at once it broke out in the southeast

corner, and broke right through, and if it had not been for that 36 — iron pipe in there why the tunnel would have washed out and the whole thing would have gone, and the next one would have gone with it down into the river, but the water ran through that pipe that was immovably fixed in this cement in this tunnel; and it turned out that in putting in this tunnel under here that as they came up underneath the bottoms of the basins it kept caving until it got a hole 25 or 30 feet back up over the top of the tunnel and between that and the bottom of the basins and there was only eight or ten feet of earth left solid. Nobody had told us anything about that, and the result was that we had to, to save—the river was so close in here—that to make that absolutely sure Captain Rugar went with a wall down to bed rock. I think it is sixty odd feet—about sixty feet down to bed rock and sixteen feet wide on the bottom, made of concrete, and brought it up to within about seven feet of the top of the ground and six feet wide on top, and that goes across from the south end; from up a ways on the south end of number 1 across between number- 1 and 2, and then down number, south on number 2, for a ways and then there is a cross wall leads into number 2 and a cross wall into number 1, here at the corners.

This was made necessary not by that washing that did take place but that was, the washing was simply an indication of what might always take place with so narrow a margin as the river had caused by the washing in of the river during that summer; to make it secure for the future the Captain lived here in a little shanty, down here.

Mr. ALVORD: I would like to ask a question:

Q. You came here with Captain Rugar; at that time was there a change in the management?

A. I came, was here in August 1888 and Mr. Wiley resigned suddenly.

Q. Was there a change in the ownership of the works at that time?

A. No, there was some stock changed. He parted with his stock and resigned his office as Director and an officer of the Company; and I had no more intention of staying here over six or eight or ten days, when I came here, than I have now; and yet I staid here five months.

Q. But this settling basin project was started by the management which—

676 A. It was agreed upon between Mr. Wiley and myself, but he was the man that had charge of it. He had considerable experience in water works and he intended to have two independent settling basins as the old basins were at St. Louis. That was the second problem that faced us, was the method of clarification of the water. He and I became satisfied if we had two basins by the time you exhausted one and had been filling on the other one, and had nothing but muddy water to draw from. That you would have to have several basins anyway; and if you had several basins and did not have them connected from one to the other that the water in the summer time would become stagnant. As it is now the water is never still from the time it is running in the river until it reaches

the consumer. It is always in motion. It is slow motion through the basins.

Mr. BENZENBERG:

Q. Is this present system of overflow, skimming off the top from one basin to another, designated at that time?

A. No sir, before then. That, as I say, Captain Rugar and I went down to St. Louis and examined those basins there and were not satisfied. We went into the question of filtration, both by vats and mechanical filters, and were not satisfied with that with the immense quantity of stuff that has to be taken out here. Then we went down to the old Pumping Station, and Captain Reynolds had introduced the system of a single overflow from one basin to another, down here, and we both came to the conclusion that it was the true solution of the problem of taking the dirt out; and it does; it takes all the dirt except some little coloring matter; and it does, I can show you, with two tubes of water how thoroughly it takes it out—even if people wanted to filter afterwards to take out the slight remnant—that what is done is something which could not be done by filtration.

Q. This system of a series of reservoirs with overflow from one to the other?

A. Was Captain Reynolds' idea.

Q. And was developed at the time of the construction?

A. Yes, developed at the time of the construction; Rugar developed it and carried it out. It was Captain Reynolds' idea.

Mr. HALL:

Q. Just to get it in the record, Mr. Underwood—we all know it—just state whether the water supply here, the Missouri River supply, is one which requires a peculiar method, different method to handle it, from the ordinary water; and for what reason that is true?

677 A. It does require a difference in method. It carries a large immense quantity of sediment. A great deal of it settles with a great deal of rapidity. I have seen the river here in such states that with a six foot depth in ten or twelve minutes we would get fifteen inches of sediment off from six feet of water. And we can take two tubes and fill with water here, six foot tubes and let them stand twenty-four hours, one tube filled directly from the river and the other tube filled from the water that is supplied to the town, and the sediment in one will be enormous in quantity while in that, that is being supplied to the towns it is just a little light grayish coloring matter, like very fine ground clay, which I attribute to the Bad Lands in North Dakota. It comes in there and that is so light, almost the specific gravity of the water, that it is very slow in sedimentation; but it won't gather on a cork in 48 hours, at the bottom, to exceed a sixteenth of an inch off of six feet; and, of course, if you wanted to put in an artificial —, to supplement this and get absolutely colorless water, you would supplement this by mechanical filters; but the work which would prevent the mechanical filters from operating would have been done by the basins, and the mechanical filters would have but a very light, easy task to take out this sedi-

mentary matter. In other words it would make a difference perhaps of 500 tanks down to 50 tanks. Perhaps that is too much, the difference.

Q. Now, Mr. Underwood, I wish you would look over these photographs which have not been offered, in this book and state whether they are correct representations of the basins and plant, and as illustrating the situation at the time they were taken?

A. That one is, and that one is, and that one has been examined, and that one has been examined, and that, and that and that one—anybody can see it that looks out there from the tower of the pump house. That is a good representation of the overflow; that is another one close by. That is another. Those wears, I should say, that go across here, those were not on the old basins down here. Rugar invented those, and they are in complete contraction so that it throws the water out and gives a stream of air under them for aeration purposes. That is correct. Those are all correct. Those all. Those are. Those I don't know so much about. Those are overflows. These here are on the other side of the river. So is this. All those are on the other side of the river. That is correct. I don't know what that is. That is the old river station. I would not say about those.

Mr. MANSFIELD: Up to these which represent—

Mr. HALL: Yes, up to one headed See Drawing B-300 710. I offer these photographs in evidence except so far as they have been already offered. Being Exhibits 1008 to 1031, inclusive.

678 Mr. HALL:

Q. Now, as I understand it, Mr. Underwood, this filling along the river, which protected these basins on this side, went down to bed rock?

A. Yes, along here, from here above, opposite the pump house above it was washed badly so that the original willows went down. Down below there commenced to be a little more mud on the bed rock until you get down to the lowest crib there was about eight feet of mud that with each succeeding year kept settling and then we loaded it heavier with stone so as to bring it up to its level. When it reached its point it would not settle any more.

Mr. HALL: Now, then, I think, if you can point out to the appraisers just where that fill was, on the ground, I guess we would all like to see it.

Mr. BENZENBERG:

Q. How much was the depth down to the rock at the lower crib?

A. Eight feet, about, of mud.

Q. No; I mean depth of water?

A. Fifty-four feet of water and mud. The crib went to the rock. We washed out the mud by means of an inch and one half pipe, I should think, on a hose, and 125 pounds pressure on the pump. The crib was anchored. Sticking that down underneath we washed out the mud until we got to bed rock itself. The crib went on the bed rock.

Q. How far was this crib out from the bluff or bank at that time?

A. The inner end stuck right into the bluff, just against it.

Q. And what was the size of the crib, about?

A. It was fifty-four feet below the water-line at ordinary water, and I should say twelve feet or fourteen feet above so as to be above high water.

Q. And the length? The outer edge to the bluff?

A. The outer edge to the bluff—guessing at it now after the expiration of fourteen or fifteen years—I should say it was two hundred feet long.

Mr. ALVORD:

Q. What would be your recollection of the width of the crib at the bottom?

A. It was the same width at the bottom as the top, and I should say the width was about twelve or fourteen feet. You see behind each one of these cribs an eddy would be made, and that would throw the water into this eddy. It would settle into this rock and fillows and make it in tight; just as tight as a bottle.

9 Mr. HALL:

Q. Can you give, Mr. Underwood, substantially, from your knowledge of that, the depth of that filling in there of concrete and matted all the way through, the crib, I mean?

A. Which one? The last one?

Q. The one which protects the basins?

A. Why, you mean the wall of the crib?

Q. The crib?

A. Well there are several cribs that protect the basins, but if you mean the cross wall that Captain Ruger put in there in the winter when he had the break——

Q. Which way did that run?

A. Parallel with the river.

Q. What is that depth?

A. Approximately sixty feet.

Mr. MEAD: Haven't you a map, Mr. Hall, that shows that, here?

Mr. HALL: We have, but I am supplementing that by the testimony of the men that know.

Mr. MEAD: Can't we look at that map?

Mr. HALL: When we get back from looking at this I expect to call his attention to that.

Mr. MEAD: I thought if we could see that before we went to the river, it would perhaps help us in our examination. We have not seen it at all.

Mr. HALL:

Q. At that farthest corner of the lowest crib down the river, when you got through settling, how deep was it?

A. I say it was fifty-four feet deep from the water line to the bedrock, and there was about eight feet of mud on it, which we washed out. Fifty-four feet from the bottom of the crib up to the water line, and ten or twelve feet above the water line.

Q. That would make how many feet altogether?

A. If I learned arithmetic right when I was a boy, sixty-four to sixty-six feet.

Q. Calling your attention, Mr. Underwood, to Exhibit B-300-71, so far as it concerns the riprap and crib work on this side of the river, I would like to ask you whether that correctly represents that riprap?

A. If the scale is right, it does; I should say from my recollection, but I am not speaking as an engineer. I am not an engineer.

Mr. HALL: Now, I guess we will go out and look at that.

Whereupon an adjournment was taken to allow an inspection along the river front.

680 Mr. HALL:

Q. Mr. Underwood, you have now been out on the ground where this sliding away occurred?

A. Yes.

Q. Speaking now from having examined the ground, about where would you say that that was, the west line of that slide as marked now on the ground?

A. The principal slide, as I have said all along, was between, perhaps the center part of it was about between basins 1 and 2, extending northward and southward from that. Then there was a smaller slide further south, and there was a slide right near the pump house, almost opposite the pump house; but the principal slide was right in there about at the dividing line between basins 1 and 2.

Q. How far west did that go; what point would you fix as the western line of that slide, as indicated on the ground now?

A. Somewheres about—it brought the bank of the river very close in to where the outer edge of the roadway is.

Q. How with reference to the fence that stands there?

A. I can tell you better with reference to the edge of that basin; about 135 to 150 feet east of the basin till you come to where it was the edge of the bluff; at the nearest point; that would be my recollection, that is, after fifteen years, and I have never been on the ground but once before since 1891.

Q. After that sliding away this was filled in as we see it now?

A. Yes.

Q. That includes the railway there?

A. Yes.

Q. These other slides that you spoke about were also filled in?

A. Yes.

Q. And the whole ground was levelled off and put in the shape we see it now?

A. Yes, the whole front of the river, front property was filled in—stone, down about 150 feet beyond the end of the stone wall that you see there; and then this was all uneven and gullies and everything of that kind, and that is all levelled off, and as I say, the whole distance along that wall was filled up with earth that was taken out of streets up on the hill above Florence here and put down in so as to bring it to a natural slope between the top of the wall and the bank.

Q. Just before we went out to look at the ground, basins and

riprapping and where this sliding occurred, I called your attention to this map, being B-300-71, and I will ask you to state whether that map is a correct representation of the general nature and character of that riprapping as indicated?

A. Generally speaking, yes; but I cannot state feet and things of that kind at this distance of time. Perhaps I never had them exactly. I did not know the details of this engineering; I only knew that certain things were done and the way in which they were done. Somebody else did the details of the work. I was not an engineer.

Q. I am simply referring to this in a general way, whether that shows generally the character of it?

A. Yes.

Q. That is substantially correct?

A. Yes.

Mr. HALL: I will now offer this map, B-300-71, in evidence, so far as it pertains to the riprapping on the Nebraska side.

Q. Mr. Underwood, are you sufficiently acquainted with the construction of the Florence Pumping Station as to be able to state whether the maps in evidence here, or given here, are substantially correct so far as they cover the underground work?

A. No.

Q. Mr. Underwood, how familiar are you with the riprapping work on the other side of the river?

A. I am not at all, except this: that before I ceased my connection with the Company Captain Rugar and I had examined the other side of the river and had certain soundings made to ascertain which way the dip of the bed rock was; and we were alarmed about washing through the point, and we had determined to put in riprapping over there in the course of another year. That was in—we determined that in the latter part of 1890 or the beginning of 1891, that it was necessary to prevent it; and the general character and kind of riprapping we proposed to do.

Q. I see.

A. But the first details of it never had been worked out in any way. And then, since that time, I know nothing about it.

Q. I see. I guess that is all then, Mr. Wright.

Thereupon an adjournment was taken until Saturday, October 22nd, A. D. 1904, at 9:30 o'clock, A. M., at Minne Lusa Station, Florence, Nebraska; at which time the following proceedings were had, viz:

Cross examination not offered:

Redirect examination.

By Mr. HALL:

— Mr. Underwood, in all your experience in connection with water works plants, have you ever seen the method of sedimentation that is adopted here—that is in use here, rather—at any other place than this, before this?

A. No, never heard of it.

Q. Now, had you ever seen the method of cleaning basins, up to that time that this method was adopted here, in use anywhere; the method that is in use here for cleaning out the mud?

A. No.

682 Q. It was, then, a novelty, at that time, was it not, so far as you know?

A. Yes sir. The method of cleaning out the mud was different up here than it was down at River Station—that is in detail. The principle, perhaps, was the same.

Q. But it was new?

A. New.

Q. Now, what is the saving; what is saved by that method of cleaning the basins?

A. It is difficult to estimate the amount that is saved, but if my recollection serves me right these particular basins in the spring of the year, one that is in use say for four weeks, or five weeks, will accumulate six or eight or nine feet of mud, the first basin; the second basin will have a less amount in it; and to take that out by any means, to haul it, out, or anything of that kind, would be very expensive. When they built the old basins down at River Station they had no drain at all. After a while they went to clean it out, and my recollection is that it cost them about \$1800 to get the basin cleaned out. That is as much as I can say about it. I think it is patent to anybody that with the immense amount of sedimentation that there is here at times when the river is dirty, and settling so quick as it does, that to take that and clean it out in half a day with a couple of men is a very cheap method and satisfactory.

Mr. ALVORD:

Q. Have you any idea, Mr. Underwood, how many gallons of water it takes, on an average, a day, to clean out the mud out of these basins?

A. As I say, I think they clean in the spring of the year here a basin about once in four or five weeks, the upper basins, the ones that they have been using; and they draw down, by means of the mains, the water in that basin so it just lies a little over the mud, and then they start the pump on that basin, running a stream of water into it from the river (not settled water), and the mud, the main part of it goes out itself, you know, through these openings into the cast iron sewer beneath, and so into the river below the intake. And then, just to clear off any portions of mud which stick or adhere to the sides, why men take hose and wash it off. It is not any great quantity of water, and it is only about once in four or five weeks it has to be cleaned off, in the dirtiest season. These basins are arranged, all those upper basins, so numbers four and five can be used alternately; or, if it be necessary, both 4 and 5 go out of commission and number 3 is used as the first basin.

Mr. MEAD:

Q. Most of the mud is caught in the first two basins?

683 A. Most of the mud is in the first two basins; almost all of it. I think that basin number 1 was not cleaned but once

after it was put in operation in 1889, until 1891; in two years time. I think it was not cleaned but once, if it was cleaned that many times. I did hear of its being cleaned once and their finding four or five inches. It may have been after my connection with the Company had ceased that I heard of it.

Mr. MEAD:

Q. Just incidentally. How about cleaning reservoir 3?

A. Well, that can be cleaned the same way.

Q. But as to the quantity of mud that has been found in that?

A. Well, I don't know how much has been found in that, but comparatively small with the first basins.

Mr. HALL: I will say to you, Mr. Mead, that we will put on a witness or two on that, that has had a little longer experience up here than Mr. Underwood, whose experience is somewhat general.

Mr. MEAD: Yes, I see.

Mr. HALL:

Q. One thing, Mr. Underwood; you speak of the first two basins; by that I suppose you mean the first two basins from the Water Works?

A. I mean 4 and 5, the first two the water enters:

Q. I noticed in the cross-examination, Mr. Underwood, that while your attention was directed to the big slide, you did not make a complete statement of that. I wish you would just describe that slide and the nature of it?

A. Which slide do you mean?

Q. The big slide that went across the road, opposite 4?

Mr. WRIGHT: I didn't interrogate about that at all.

A. As I say, I was not here until after Captain Rugar had been down here—if you refer to the one when the last wall was built—what that what you refer to?

Mr. HALL:

A. I came down here afterwards, anywhere from three or four days to a week or ten days after, and came out here, and they were at work on the big wall. I remember going along there—I can't tell you how long it was—but seeing the caveage between the sides of the earth on the side of the bank where it had become pretty nearly perpendicular but in the remainder of the bank. There was a cave there that you could look down into and I could not have told you whether it was five or six feet or twenty-five or twenty-six feet deep. It stood there just as if it was ready to fall off.

Q. If there is anything further that you would care to explain, Mr. Underwood, why I would like to have you do it. I don't think of any particular thing I want to ask you further on.

A. There is only one thing that occurs to me. Somebody asked me when I testified before, about the concrete of the bottom of the

basins, and I said that the concrete was put on there somewhere from 8 to 10 inches thick. I mean on the slope on the bottom and on the slopes, the side walls, the perpendicular walls are made of masonry. I didn't mean to be understood that the perpendicular walls were made of concrete but that the slopes and the bottoms of the basins were made of concrete and the side walls, the perpendicular walls of masonry.

Mr. WRIGHT:

Q. Rock?

A. Rock masonry and plastered over the Portland Cement.

In the Matter of the Appraisalment of the Omaha Water Works.

*Testimony Taken at Florence, Douglas County, Nebraska, on
Saturday, October 22, 1904.*

Present: Messrs. Mead, Alvord and Benzenberg, the members of the board of appraisalment, and Mr. R. S. Hall, representing the Omaha Water Company, and Mr. C. C. Wright, representing the City of Omaha.

FRANK REYNOLDS, called as a witness on behalf of the Omaha Water Company, being first duly sworn, was examined in chief by Mr. Hall, attorney for the Omaha Water Company, and testified as follows:

Q. Captain, you can state your name and where you live?

A. My name is Frank Reynolds; I have been in Florence for fifteen years.

Q. What time, Captain, did you first commence work, in connection with the water company at Omaha?

A. In 1884.

Q. At that time what was the name of the company here?

A. There was no company here at this point but at Omaha.

Q. I mean at Omaha?

A. At Omaha, yes.

Q. Was it the City Water Works Company?

A. The City Water Works Company, I suppose it was called. I don't remember anything more than the Omaha Water Company; I don't remember what title they had then.

Q. It was the old city company?

A. Yes, the old city company.

685 Q. When you commenced working for the company in 1884, what was your position?

A. I was engineer of the river station in Omaha?

Q. Were you there when the river station was constructed?

A. I was there when the present machinery was put in.

Q. At the time that you came to Omaha and entered the employ of the water company, what was the condition of the plant? How far had it been constructed?

A. The building was erected there and they were working with the old pumps, and they were just installing a pump from the Allis people which they had got to running. I completed that work. The Holly people had an engine they put in but it had broken down. Afterwards we took out the old pumps and put in the Knowles pump.

Q. Were you there at the time that the basins were constructed at the river station?

A. No sir, not the old basin, but two extra basins were put in; I was there when they were built.

Q. How were those two basins constructed that were built when you were there?

A. They were simply dug out of the earth, and the embankment and the shores were lined with inch boarding to keep from washing. They were put up temporarily to bridge us over until we came up here, but it was found to have been a very good arrangement and we are using some of them still.

Q. I wish to call your attention to exhibits B108, B109, B118 and B110, being the drawing of the foundation of the Knowles pump, the foundation of the Holly pump, and the foundation of the old Allis pump, and the foundation of the Allis pump at the river station and I would like to have you look at these drawings, commencing at B108. Is that a correct representation of the way that was put in and of the foundation?

A. That is a very good representation; they were put up like that and it stands there just the same to-day.

Q. That is a correct representation of it Captain?

A. Yes sir.

Q. Calling your attention now to B109, that is a drawing of the foundation of the Holly pump in the river station: Now, I will ask you, Captain, whether that is a correct drawing of the foundation of that pump at the river station?

A. That is as near as I could put it because here are the water cylinders, there are the two cylinders standing there and they are standing there to-day just the same, the fly wheel works in there in that opening. That is the exact thing that we have got there to-day. It never has been changed.

686 Q. Then you say from your knowledge of that work that that is a correct drawing?

A. In a general way. Well, I presume it is absolutely correct, but in a general way I know it is correct.

Q. Calling your attention now to B118, which is a drawing of the old Allis pump?

A. Yes sir.

Q. What would you say with respect to that, Captain?

A. I don't see a thing wrong with it. I don't see anything wrong with it at all.

Q. Was that the way that was put in at that time?

A. Yes, it is a very heavy put in there, because we were fearful of settling on account of the sand. We were a little afraid of that

and put in a large amount of concrete. That was done before I got there.

Q. You say the concrete?

A. I saw the concrete; I had occasion to dig into it once or twice for pipes.

Q. Now calling your attention to B110, the drawing of the foundation of the Allis pump; were you there when that was put in, Captain? That is, not the old Allis pump, but the other pump?

A. Yes, sir, the one that is down here.

Q. This is the river station?

A. That was at the river station.

Q. I am speaking now of the foundation works; that is all I am calling your attention to now; Is that a correct representation of that, Captain?

A. Yes, that is correct, that stone work is in there now; that stone is 18 inches thick, and those anchor bolts go through. That is all right. I put that in myself.

Q. Now, calling your attention, Captain, to Exhibit B. 103, that is an estimate of the stuff. You have not figured on that, I suppose, Captain?

A. No, not at all.

Q. Turn to B111, ground plan of the pump house at the river station, I will ask you to state, Captain, whether that is a correct ground plan of the pump house as it exists now?

A. Well, I should say, in a general way, that it must be correct, because the coal sheds would be put on there from the chimney measuring up to the face of the chimney, there is a sliding door there that goes into this boiler room; there is an opening there, and the boilers stand there.

By Mr. WRIGHT:

Q. Do any boilers stand in there in these coal sheds?

A. Not in the coal shed; no here is the boiler.

687 By Mr. HALL:

Q. Now, I call your attention to B117, contour map of the original ground?

A. I don't see anything wrong with that.

Q. You would say that is correct then, Captain?

A. Yes sir.

Q. Now, I call your attention to B117, contour map of the original grounds; I wish you would look that over and state whether it correctly represents the contour of the original grounds before the work was done there?

A. That represents them just about as it is. The form of these basins were those that I put in; the water comes in there; it don't show on that part of it, but the basin work all of that I see is where we put these extension basins on there that we are still using, dotted in there, there is the dotted line of it, and also the basin put in here; that we have abandoned some time ago since we moved up here, but

that basin we still use; we pump in here over these floors and over there and draw back here.

That is a correct representation of that and of the way the building stands, the pump stands, the Knowles pump and the boilers, the Allis engine, the chimney. That is as near correct as I could place it. This is the original reservoir and this is the one that we put on.

By Mr. WRIGHT: This is the original at the time when you commenced work?

A. Yes, excepting that I put this in.

By Mr. HALL:

Q. Then, to make it clear, what basin was there when you commenced work, Captain?

A. These three basins and this clear water basin.

By Mr. WRIGHT:

Q. You put in the overflows?

A. Yes sir.

By Mr. HALL:

Q. What is marked number 4 on the map?

A. Yes sir. There is a wall there and there is a wall here, and it goes down running through there.

Q. How deep are those basins now?

A. I don't remember the depth of them. I should say about 20 feet. I should think, as near as I can remember, 20 to 25 feet. This basin, that is the north basin that we added, is 20 feet, and we aimed to carry 20 feet of water in it.

Q. That is, from the top of the bank?

A. Yes sir.

Mr. HALL: I offer in evidence B108, B109, B118, B110, B111 and B117.

688 Q. Now, calling your attention to B115, being a profile of sewers and wells, page 29, I would like to have you look at that, Captain, and state whether that correctly represents the sewers and wells as they exist at the river pumping station?

A. Well, of course, these angles, I do not know exactly, but I should think they were about right because you can walk up and down them on these angles, you can walk without slipping, and those sewers are in there with the well and the valves. They are placed in those wells to draw off the basins, there is only one mud valve a little lower at one end than it is at the other, and the mud goes out down to place, the valves are in these wells and the sewer washes it out to the river. The whole thing seems to be correct. I don't see anything the matter with it. That is the way they are constructed.

Q. You would say that is correct, Captain, from your knowledge?

A. Yes, as far as my knowledge goes they are correct.

Q. How are those basins constructed with reference to getting dirt out?

A. There was a mud valve in one end.

Q. No, when they were originally constructed?

A. Oh, when they were originally constructed. Those were constructed before I came here, the basins were, those basins, those three basins, before I came here, and I don't know anything more than just as they are today.

Q. But the others: How did you get the dirt out?

A. Never took it out. We took it from the old floors and didn't carry any dirt over into the other.

Q. How did you get the dirt out in constructing it?

A. Oh, we took it out with scrapers and teams. And there is something, perhaps, that it would be a good thing for some of these gentlemen to know. There is a basin 600 feet long, I think, and it is 200 to 250 feet at one end, and narrower at the other. I don't know just the dimensions, and we dug that out of the river, quicksand you might call it, so much so that we dug down to the water level, and the river rose in there and we had to haul out the horses there with ropes, they got into the quicksand, and yet we were figuring to put that great big basin in there and pump water from it without lining it, as an experiment to carry us over until we got this place started. I started up a pump, an Allis pump, ten million pump, and pumped in there about 36 hours and the water commenced to raise and we carried it there for 18 years, and there ain't any lining in it at all. The earth was all removed by scrapers and horses, and still folks will tell you you can filter that water.

689 Q. Calling your attention now to B114, page 28, the detail drawing of the wells of the basins, I will ask you, Captain, to examine them, and state whether that is a correct representation of the wells as they are on the company's property?

A. That seems to be the way they are made; I don't see anything the matter with it. These are connected across so they were built both in and out, running that way. I don't see anything the matter with that: It looks to me as though it was all right.

Q. Then you would say it is correct, Captain?

A. I would say that is correct.

Q. Calling your attention to B116, found on page 30, I ask you to look at that map and state whether it is a correct representation of the basins and pumping house ground plan?

A. That is this basin that we put in that I spoke about there; they are also there, also there, back to the clear water basins. That is correct in every respect. Our filling pipe around here, the old main to the city; this extra basin that we put in here, sheds. That is correct.

Q. Calling your attention now to B119, found on page 32, being profile of basins and cross sections of wires; I will ask you to look at that map and state whether that is a correct representation of the property of the company as it exists on the ground?

A. That looks to be correct, that is the way that was done when the wall was in there. I would call that correct.

Q. Calling you attention to B 120, found on page 33, being gov-

ernment borings and elevations of bed rock; I don't know, Captain, as to whether you are informed about that or not?

A. I have never known anything about that part of it, only in a general way they told me there was about 30 feet, the Union Pacific folks told me that this station, old pumping station, that they had here, which was another demonstration of filtration, it was about thirty feet down to bed rock all along there. I don't know.

Q. You don't know whether that is so or not?

A. Only from hearsay.

Mr. HALL: Then I will not offer that. But I will offer B114, B115, B116, B119.

A. There is a good thing in filtration again. The Union Pacific did not want to pay for the water. They put down two or three feet wells, they put down two or three twelve down to bed rock, just behind the riprap there, and built a pumping house and put in their engines and in less than two weeks they were stopped up and then they went to work and bored 16 wells and then abandoned the whole thing. Yet they tell you you can filter water. They tell you you can filter it.

Q. I will call your attention now to B 121, on page 34, being a map of the river work, showing the location of riprap at the river station; I will ask you to look at that, Captain, and state whether it is a correct representation of the location of the riprap?

A. They don't show this section line here.

Q. No, this is only just showing the location of it. It is offered for that purpose. Does that correctly locate the riprap, Captain?

A. The riprap runs just about straight here. There is a place it shoved out in deep water, crowded out and made that point, there. We have a suction pipe running out right there and have also one here.

Q. That is indicated by that dent I suppose?

A. Yes, that is the old St. Louis bridge pier, and we run out there that pier that comes down in there.

Q. Does that correctly show the location of the riprap, Captain?

A. Yes, it does; it is just about straight.

Mr. HALL: I will offer that in evidence.

A. The Union Pacific done a lot of work along there and up in there found a pocket and it went out as fast as they put it in. I don't know how many thousand carloads; a good many.

Q. Calling your attention to B121, found on page 35, being a cross section for the riprap, and showing the location of the cross section?

A. Well, no, that part, you know, was put in before I went there, along there by the pumping house, was put in there, and I always supposed that was put in probably by the Union Pacific, as I understand it, but it is an immense piece of work they put in there, and they told me the number of thousand tons of stone that went in there, they told me the number of thousand loads of stone that went in there, but in a general way I know that that work is all in there;

there is no question about that. Anybody can go and see it; it is there in sight all of the time.

Q. Is that a correct representation of it, Captain?

A. Well, I would say it was, very near. It crowds out. I would think that is just about the way it looks. That is the way it shows on the surface of it, and it is built up solid, built from bed rock.

Q. There is no question about its going to bed rock there at all?

A. No question at all, sir; the river ran tight against it, 691 and where the river runs against this bank anywhere, if it does not go to bed rock, it will go down.

Q. Now, as to who put that riprap in you don't know?

A. No, sir, I do not.

Mr. HALL: I will offer that in evidence.

By Mr. WRIGHT:

Q. All you know of this riprap is what appears on the surface? It was in there before you came here? It was in there before you went here?

A. Yes sir.

Q. And the depth of it you do not know?

A. Only it goes to bed rock. I know that.

Q. You don't know that except as you judge?

A. I know it goes to bed rock. You could not hold it any other way.

Q. You made no examination of it?

A. No, none at all.

Q. And you don't know that these measurements and scales are correct as to the amount?

A. No; I only know that they put in so much it has stopped settling and has been that way for twenty years now, the current running a great part of the time right by that against the bank.

Q. And you don't know any more than can be determined by an examination of the surface there, of your own knowledge?

A. That is all.

By Mr. HALL:

Q. I call your attention now to B125, being a section and plan of Murphy boiler setting at the river station, and will ask you to state whether that correctly represents these settings to you- knowledge?

A. Yes, that is all correct now. I suppose you know that we changed that setting from the Murphy setting. We did not change the boilers at all. We had the pipe stoker in there and it melted and got out of order and we put it out, we took it out, and I put in this brick work in this way. That is correct.

Q. It shows there just as it is now, does it not?

A. Just exactly.

Q. Calling your attention to B126, shown on page 41, showing the Buckeye boiler setting; I will ask you to look at that and state whether that is correct?

A. Yes, sir, I would say that this is correct.

By Mr. WRIGHT:

Q. You put the settings in in this Buckeye?

A. Well, this was put in by contract, but I was there, I was there all the time, and then I reset all that work underneath which is shown there.

692 By Mr. HALL:

Q. So that you know just how it is done?

A. Yes sir, and it seems to be correct.

Q. I call your attention now to B208, being plan of pumping house basin, page 46, and ask you to state whether that is a correct showing of the plan of the pumping house basin as it now exists?

A. That is, that looks like a copy of that work that is there. I put in this work secondary. Yes, I had a good deal to do with it this second time it was put in. We handled all this work up here and done a good deal of work and put in suction around to those pumps. It used to come out here; we also have it out here now, and we duplicated and come around there and that is all new work put in around there. I would say I am fairly familiar with that. That is correct. I put in this boiler plant up here.

Mr. HALL: These eight now will be at the Walnut Hill station, and I will read the particular plan as I call attention to it, and we will try and refer to it so that it will be understood.

Mr. MEAD: We can see it when it comes to any particular points.

Q. Calling you attention to B209, found on page 47, and being profile of basin showing construction; I will ask you to look at that, Captain, and state whether it correctly shows the construction of basins at Walnut Hill as it now exists?

A. Yes, I think that is a correct representation of it, it seems to show the two basins there with the slope and the pipe connection; we connect in there, and here is shown the pipe that goes into that well, and it takes its opening out each way into the basins, and it is lined with concrete at the bottom, and is bricked upon the sides and the general outlay I should say is correct.

Mr. ALVORD: I would like to ask, before you turn away from that, if the Captain could say whether the embankments of that reservoir were made wholly from the excavation, without any material brought in from the outside?

A. I could not answer that, because the basins were made before I came here. Mr. Hunt, I know, had charge of the construction, and I never inquired to know whether there was dirt brought there or not; that work was done before I came here, except the additions that we have made to it.

Mr. HALL: We will supply that by other testimony.

693 By Mr. HALL:

Q. I show you now a cross section of the Hamilton street slope, page 48, being B210, and ask you to state, Captain, whether that is a correct cross section of that work?

A. Perhaps I don't know about this sufficiently to testify about that. No, I don't believe I can. Of course I understand just how that is, but in this cross section I would not want to undertake to go.

Q. That is Walnut Hill?

A. Yes, I understand. I would not understand these elevations very much without considerable study. But in looking at the slope of the ground I would say it was; that it looks to be all right. I would not want to give any testimony now about it, because it is something I have never looked at at all.

Mr. HALL: I will not offer that then, but I will offer B208 and B209.

Mr. MANSFIELD: You have not yet offered B125 and B126.

Mr. HALL: I will offer B125 and B126 also.

Q. Calling your attention now, Captain, to exhibits 1032, 1033, 1034, 1035 and 1036, I will ask you to look at these pictures and state whether they are correct representations of the parts of the river station which they depict?

A. Well, yes, they look very familiar to me.

Q. Are they correct, Captain?

A. Why, I should say they were in a general way. I presume they are absolutely correct, the location and the way the things set, the way the chimney is located, and the showing down here at the front, this riprap work, why, I would say that even our old derrick standing there, I would say that that was a good, a correct representation.

Mr. HALL: This is 1032. I will offer this in evidence, then.

Q. Have you looked at all of them Captain? Please look at all of them, Captain, and then if you say they are correct, I will offer them.

A. Yes, that is correct; yes, that is a correct representation; there is the house, there is the cottage, and there is the stable. I would call them correct.

Mr. HALL: I will offer them in evidence, exhibits 1032 to 1036.

Q. Calling your attention now to B300-11, B300-12, B300-13, B300-14; being plans found on pages 54, 55, 56 and 57, being plans of the elevation, front side and rear of the floorings of the pumping station, I will ask you to look at these plans and state whether they correctly represent the plans of construction as that building was constructed on the grounds of the company.

A. I think it is absolutely correct.

Q. Look at this also, Captain?

A. I have never seen these drawings, but the building is there and I guess all these measurements would carry out to a fraction, every bit of it. I saw them taking these measurements and they were very careful about it to very exactness.

Q. I suppose there are some minor changes in these plans, Captain?

A. Well, there has been a little in the building from the first rep-

ntation; some very simple, some very small, things. We have a little bit in not in the original. We have added on to the east, put in some there, but this work, the whole thing of paneling over the coping of the roof, is all in, the windows, the representation of a little carving that we have not got on. I believe that was to do. I don't know but what we have got that little piece of carving up there. The windows are all correct. That represents the building very nicely, I think, indeed.

Q. Turn over to the other three, two?

A. I don't think it looks as good as the building.

(Laughter.)

Q. From looking at this, at these, would you say they are correct, obtain?

A. I would say they are correct.

Mr. HALL: I will offer those in evidence.

Q. Calling your attention, Captain, to pages 58 and 59, B300-15, showing the foundation plans and section through footing; I wish you would state to the commissioners just what you know about the putting in of the foundation of that building and the foundation of the pumps?

A. Well, they say the proof of the pudding is the eating of it. Our engines so far, for fifteen years, have never shown a crack, have they given in any manner or form in any direction, and must say that I think the foundations are equal to any that I ever put in anywhere. I think the foundation of them two big pumps standing here is not beat in the world. There is a large amount of it and it was put in as it ought to be. That big engine has been standing there on that for 14 years turning away and there never has been a crack nor did anything give. The engine is absolutely in it and it is as good as the day we put it up. We put it in about, my remembrance is, about three feet of concrete under the bottom of the stone work. The stone work has, I think, eight feet of solid masonry; the stone work is, I think, eight feet of solid masonry, cut in great big stone and laid in with Portland cement, and the washers, foundation plates, are six hundred pounds each, brass nuts let in down there and built in, and the foundation of the building itself was very heavy and of the very best of work. I cut holes through that foundation afterwards for the pipes that we needed on here, and cut around the stone, cut out the joint, carried it to one end, and then drove wedges to break the other joint and broke the stone off with the material. Everything that went in there, and there was a large amount of it, was put in of the very best, and the work is showing so. Now, the boiler plant in there has got about eight feet of stone work, the whole bigness of that building, under the boilers, and filled up with concrete, so that there never will be anything take place like the upright boilers which we had. Mr. Wiley had ordered these boilers and the least give in the foundations would break our steam connections and injure the plant, and every precaution was taken to make that very solid, and it is solid. The footing of this tower, I had occasion to know something about that. It cut through these walls here, four or five feet thick. Originally

there was an opening in that tower at the bottom, and I thought we could utilize it as a store room which I did do. Made a vault of it. I cut through the walls and done this work and in doing that I found out what was in there. I knew at the time we erected it that it was very heavy, but it was an extraordinary piece of work that carries that tower.

Q. Looking, Captain, at these two exhibits B300-15, found on pages 58 and 59, being foundation plans and section through footings; I would like to have you look at them, and state whether they correctly show the footings and the foundation plan?

A. That looks to me to be about what was done there.

Q. Would you say that they were correct?

A. I would say correct, yes, sir; I saw all of this work it stood open; it come up to the ground level and stood open; I saw it there in that form quite a long while come on cold weather and they could not work in cement, and it stood there until spring; they had done a little work in there in that wall that they was afraid of, and worked a little too late with the frost, and they took it down for fear that something might not be all right, and put it back in the spring. I would think that was correct. I found this place when I put this vault in, in looking for a sewer, this opening there, and that is almost a solid wall of cement, of masonry work. I have got a hole cut right in there, an iron door plate there, and sky-lights in here.

696 Mr. HALL: I will offer exhibit, B300-15 and exhibit B300-15 two sections, in evidence.

Q. Calling your attention now, Captain, to B300-16 and B300-17; B300-16 which is the ceiling plan of the station at Florence. I will ask you whether that is a correct representation of the construction of the ceiling?

A. Yes, that is correct.

Q. Turning now to B300-17, transverse section showing roof, I will ask you whether that is a correct representation of the roof construction?

A. Yes, sir; that is correct. We hoisted this engine on trusses.

Q. That is, you held the engine from the trusses on the roof?

A. Yes, and never give in anything in any way whatever. We have a traveling crane up in there above the ceiling; it was not originally intended for a traveling crane, and it was not high enough to have our table swing clear, so I took out the ceiling between two sets of trusses and built my truss up in there, and carried on them two trusses, one on each side, and then we had some pieces weighing 72,000 pounds.

Q. Calling your attention now to B300-18, being longitudinal section of the roof, I will ask you whether that is a correct representation of the roof as it is there?

A. That is correct.

Q. Turning now to page 63, B300-19, plan of roof; I will ask you to state whether that is a correct representation of the plan of the roof?

A. That is correct.

Mr. HALL: I will offer in evidence B300-16, B300-17, B300-18 and B300-19.

A. The object in that roof, in the first place, was that there was to be something to lift by, and it was built to carry a load, and we put the load on heavy.

Q. Calling your attention now to B300-110, page 64, being section and plan of the tower; is that a correct representation of the plan of the tower?

A. That is correct.

Q. Calling your attention now to B300-111, page 65, being a section through the pump house, I will ask you to state whether that is a correct representation of the pump house construction as it now exists?

A. I should say that was absolutely correct. It was double trussed half way up in the roof. Windows are put in in that form. Top on the arch. I should call it correct.

97 Q. Calling your attention now to B300-112, ground plan of the station, I will ask you to state, Captain, whether that is correct as it is now built, unless there should be some additions that they have made since?

A. No, that is in there, that is all right, that answers it all right.

Q. Calling your attention to B300-113, page 67, showing the section through boiler room and low service room, I will ask you to state whether that is a correct representation of the construction which it purports to represent?

A. I should call it correct; absolutely correct.

Q. Calling your attention now to B300-114, plan of basement showing sections; I will ask you to state whether it is a correct representation of the basement as it exists?

A. That is correct.

Q. Calling your attention, Captain, to B300-115, being plan of the barn and store-room, I will ask you to state whether that is a correct representation of the property of the company as it now exists?

A. That is correct.

Q. Calling your attention now to B300-117, being plan of Captain Reynolds' house, I will ask you to state if that is correct?

(Mr. HALL: The captain undoubtedly knows that.)

A. That is correct.

Q. Calling your attention now to B300-119, detail drawing of chimney. I will ask you whether that is correct. It is the chimney of the pump house. Is that correct, Captain?

A. We redrilled for this and we was at a loss to know how to head that from there, so we commenced at the chimney and drilled down until we struck this place down here, until we struck that concrete right down there and opened up the side so as to be sure about that. That is correct. We done that this summer, that is the foundation there, we bored down until we struck this, and then went down in there on this line with fire brick. One hundred and twenty

feet in height; I think that is what it is; 120 feet to the surface of the ground, and then we dropped down, the cellar was excavated. And this is 120 feet deep all told, of elevation, but the chimney goes below that, the foundation goes below that. That is correct.

Q. Calling your attention now to B300-121 to B300-127, inclusive being plan and elevation of cottages numbers 1, 2, 3, 4, 5, 6 and 7; I will ask you to state whether those are correct?

A. Yes, those are correct in outline. Of course I don't
698 know the exact fraction of them; of course I don't know about that. But that is the style of the house.

Q. That is the general construction?

A. Yes sir.

Mr. HALL: I will offer in evidence B300-110, B300-111, B300-112, B300-113, B300-114, B300-115, B300-117, B300-119, B300-121 to B300-127 inclusive.

Q. Page 83 now. Calling your attention to B300-131, being plan of valve well, east pump house, B300-132, plan of roof house extensions, B300-133, plan across the main building and the roof trusses, four of these, being 83, 84 and 85; I will ask you whether they are a correct representation of the properties that exist?

A. That is correct of the valve house and the pipes in connection, that is correct; the truss over the low service room is being built on now; that is we are doing the work now, yes, that is correct.

Mr. HALL: I offer in evidence B-300-131, B300-132 and B300-133.

Q. Captain, I wish you would state to the commissioners the method of sedimentation in the basins, and how that method was arrived at?

A. Well, that was arrived at some years ago on one of my voyages. We were wrecked on an uninhabited coast. We were wrecked at this place amongst the rocks and reefs and high ledges that come around and shut us in from the mainland, that we would not escape. So the water was dripping down from the snow above, and it formed ponds at the bottom of this ledge, which was perhaps three or four or five hundred feet above sea level, and the water where it come down probably at times when the snow was melting rapidly, had run powerfully enough to dig out a trench there, and was probably two or three or four feet deep, narrow channel, and that was filled with birds, millions of birds. Well, it is a common thing, in many parts of the world, to dig down at the beach and have fresh water. Along most of our coast you can get fresh water. But we found out that we could not get any fresh water, not a particle. And while we would not starve to death for the birds, we were liable to choke to death. We could not drink that stuff, it was simply running thick with manure. And one old Jonah of a sailor got out his sheath knife and made a little water wheel and got that set up and going. Some of the rest did the same thing on the ditch below, and that went on several days and they all got to making mills. We had nothing else to do. And we discovered

699 that this water running out over this stone, dropping down through the open air, by the time it reached three or four of these little dams, had changed its color and changed its looks, and we dipped our fingers in and tasted it, and we could see it coming out of this pool of stuff so thick that you could shovel it. We could see that the water had changed, and drink from one place to the other, clear down to the beach. The beach below was filled with flat stones, and there was a short wall. When it got down to the beach we had water that looked like spring water. It tasted as good as any water, and we drank it for three weeks there, and lived on it. We did not drink out of the pool, it looked better down there. And we drank that, and I never expected to have a chance to use it. But when I got out here and they called up from Stephenson's stable, after I had been here a week or two, and wanted to know one Sunday morning what the devil the matter was with the water; they said, we cannot wash wagons with it. Well, I had to explain to them that it had been raining the night before and washed mud down the slopes and stirred the basins up, and the settling process that we used to use there did not work; it worked all right in calm weather, but when it came rain or there was a strong wind it would wash down the bank and it was as bad as it was in the river, and I don't know but what it was worse. So then, when we come to build up here, Captain Ruger, well, I put it in. I will say further that S. R. Johnson, who was president, of this concern, and I suggested to put in overflows in these basins down there to help us out. J. D. Cook said it was a good way to throw money away, and if we wanted to do that it would be a good place. After a long argument Mr. Johnson says, I own a little more than half the stock in this concern, and you put it in; if there is any kick about it I will pay for it myself, if we can't settle it in any other way.

I put it in as an experiment on trial and it is there today. It is running there to-day, and the results were so great that Mr. Johnson says when you get that running you call me up, and I want to come down and see it. So I went to work and put it in, and it had done the work. He came down with a couple of carriages on Sunday morning and looked it over and saw good clear water coming down, and he says that is worth \$50,000 to the company. Well, they sold very soon after that. But then Captain Ruger expressed himself about it as being the best thing he had ever seen in Water Works purifying, and decided to put it in. And I came out here with it and we talked over about where to locate it and so on and had more or less to do with it all the time. He was in charge of the construction out here and carried it out to the letter. That was the way that come about.

700 Q. Now, how are these basins arranged with respect to that now. How was that done?

A. Well, they are arranged in a series of basins. There may be a number. It may go into any number; but we found out that five basins would do the work, that is if we don't run too much water over an overflow. It depends on the surface water. If you will take deep down, if you go down two inches you can draw dirt. If you

take a quarter of an inch you can take clear water off the first basin. Take it in a calm day, and I don't know what we could do if we carried it to an extreme. But we have done our work very good with it. The first quarter of an inch comes clear off the first basin. You can take water in a tumbler up there and find it absolutely pure on the first quarter of an inch. It depends largely on the amount of the overflow, and by running it over the overflows it has demonstrated a good many things.

If I was to represent one of the things: At Denver, the city was trying to get the water works and they had condemned it on the ground that the water carried a large amount of bacteria. Well, they have put in large reservoirs on the Platte river water, or mountain water, they have put in those large reservoirs, and need a great deal of circulation of course, and their water was absolutely clear, but they said it is not good enough, so they went to work and put in, my impression is they spent 250, or \$300,000, Jewel filters, a very extensive plant, and the water come through there very clear, very beautiful. It was clear water before, but it come through there and it seemed there was no objection to it at all, in any direction, but it carried the same bacteria as it did before, it was so fine it was carried along in the water. Then Mr. Allan came here and took his cue from this place to put in surface drafts. And he didn't have a chance to do it without going to a good deal of work, but he put in big screeners and made them so they would take the water down through without any filters and that stood the test and is standing the test today. And it showed that motion, air and sun does more for purifying water than any other one thing.

Q. Captain, after you had reached this knowledge, did you in any way perfect your right to it?

A. Yes sir.

Q. What did you do about it?

A. I patented it.

Q. And you have given to this company a license to use it?

A. I have given them a license to use it while I remain, while the company holds possession of the property, and no longer.

Q. I will ask you, Captain, to look at B300-31, to B300-35, inclusive, being longitudinal sections of basins 1, 2 Ba and B, and number 4, and ask you to state whether that is a correct representation, pages 92, 93, 94, 95 and 96, and ask you whether that is a correct representation of the construction of the basins?

A. That is correct.

Mr. HALL: I will offer B300-31 to B300-35, inclusive, in evidence. They are longitudinal sections of the basins.

Q. Calling your attention now, turning to pages 101 and 102, —B300-310, and B300-311, B300-312, B300-313, B300-314 and B300-315, being detail sections from east end of basin to west end of basin, and of suction well on center line between basins one and two, and the conduit pipe in basin one, and the suction at the well on north side of basin one, I will ask you to state whether those are

correct, referring to the construction of that part of the company's property detailed in it. Are those correct, Captain?

A. Yes, that is correct.

Mr. HALL: I will offer these in evidence.

Q. Calling your attention, Captain, to page 112, B300-322, detail of masonry in conduit pipe in basin three. Do you remember when that conduit pipe was put in there, Captain?

A. Which was that?

Q. That is conduit pipe in basin three?

A. In basin three, yes.

Q. I will ask you whether that is a correct representation of the way that masonry was put in there?

A. Yes, that is correct. That pipe is carried on there through the center.

Mr. HALL: I will offer that in evidence.

A. We have a direct sewer pipe there, yes, that is correct.

Q. Calling your attention now, Captain, to B300-41, to B300-47, inclusive, being the table pumping engines, foundation of the twenty million gallon Allis pump, the general plan of the low service pump pit, and the longitudinal section of the low service pump pit, and the section of pump pit piers *c* and *d* and *a* and *b*, and foundation plan for pump, I would like to have you look at these and state whether they correctly represent the property as it exists?

A. Well, that table, I would not know anything about this, I think I would have to go into a very great deal of detail to get at that. This is no drawing.

Q. Isn't that simply a schedule?

A. Yes sir.

Q. You know whether those are there?

A. That is all. I understand that.

Mr. WRIGHT: They state the velocity.

702 Mr. HALL: If I am wrong the Captain can correct me.

Mr. WRIGHT: It includes lots of other things.

A. We have never made any test.

Mr. HALL: All right, if you don't. Well, never mind. I can prove that by most anybody that will go over that table. I will withdraw that and prove that by someone else.

Mr. MANSFIELD: Which is that?

Mr. HALL: That is the table of the pumping engine, B300-41.

Q. The foundation of the 20,000,000 gallon Allis pump; is that correctly represented there, Captain?

A. This one, yes, that is the right way. They might have shown these steel beams. That is built of steel beams.

Q. Isn't that shown on the plan?

A. No, sir, it is not. That is the top of the pier, the fly wheel, on this, the other section of it; that pier weighs 300 tons, and that is filled with steel beams; that pier, the mason told me that contained 300 tons in weight, and I was afraid it would break here, consequently I filled that with steel beams running clear up to the foundation over here.

By Mr. WRIGHT:

Q. Is that the low service?

A. That is the low service, these big pumps.

Q. That is the one in the east wing?

A. Yes, on the east wing.

By Mr. HALL:

Q. That is the one you were testifying to a short time ago? That is the one you were testifying to before?

A. Yes sir.

Mr. HALL: I will offer that plan in evidence.

Q. Calling your attention now to the general plan of the low service pump; I will ask you to state whether that is correctly represented there?

A. That is correct.

Mr. HALL: I will offer that in evidence.

Q. B300-41, longitudinal section of low service pump pit; is that correctly represented just as it is, Captain?

A. Yes, that is correct.

Mr. HALL: Offer that in evidence.

Q. I call your attention to the section pump pit at pier c
703 and d and section pump pit at a and b, being B300-45 and B300-46 and ask you to state if those are correctly represented?

A. Yes, those are correct.

Mr. HALL: I will offer them in evidence.

Q. Turn to B300-47, foundation plan for pump: I will ask you to state whether this is correctly represented, Captain, as it really is on the ground, the Gaskill pump?

A. Yes, that is correct.

Mr. HALL: I will offer in evidence B300-47.

Q. Calling your attention now to B300-51, to B300-54, inclusive, commencing at page 123, B300-51, being plan of steam pipe connections to boiler; Is that correctly represented, Captain there, as it really is?

A. Well, let me see, that probably is all correct.

Q. That correctly represents it, Captain?

A. Yes, the representation is correct.

Q. Now, I draw your attention to B300-57, plan of cast steel specials, boiler connections, and ask if that plan correctly represents the facts?

A. Yes, we made the drawings and sent them on. We made the drawings here. Yes, that is correct.

Q. B300-53, plan of cast steel compound boiler connection, is that correct?

A. Yes, we made this here.

Q. As regards B300-54, plan of smoke flue for original boilers. Is that correct there?

A. That is correct.

Mr. HALL: I offer in evidence B300-51, B300-52, B300-53 and B300-54.

Q. Calling your attention now to B300-55, B300-56 and B300-57, pages 126 and 127, I will ask you to state whether those are correct representations of the properties as they now exist. Are those correct now?

A. Those are correct. The piping, yes, it is all shown there; It is all correct.

Mr. HALL: I will offer in evidence B300-55, B300-56 and B300-57.

And now on this 22nd day of October, A. D. 1904, a recess was taken until 1:30 p. m.

Afternoon session, Oct. 22, 1904. October 22nd, 1904, at 2 P. M., at the residence of Captain Reynolds, Florence, Nebraska.

Examination in Chief of Captain REYNOLDS resumed:

704 By Mr. HALL:

Q. Captain, do you remember the work as it was done along the river here in the way of cribbing and riprap?

A. Yes, sir, I understand all very well.

Q. Were you here while that work was being done?

A. Yes sir, on the ground pretty near every day.

Q. Saw the construction as it progressed?

A. Yes sir.

Q. Now calling your attention to B376 being the plans, elevations of the cribs on the river front, I will ask you to state whether, from your knowledge of that work, those plans correctly designate the manner and extent of the cribs as they were put in?

A. Well, as they are laid out. They have not represented the framing or the filling with stone, as I see, except as it is put in figures there; but in the form of the cribs and the building out and the running into the river, I think, are all correct. This is our intakes down here. The river runs here. We built it from this line. All this in here is built out into the river so as to get it on good, smooth rock. That is all good, straight rock, almost absolutely straight there; not more than six inches difference in six hundred feet; and we built a raft opposite there when we were repairing those cribs and measured from the raft down to the rock and I don't think, at any place, there was over six inches difference in the whole foundation on that front. And we run that out there, run around there, and from there on we choked back and come straight down, and there is two cribs below that point, this way, and three above this point, this way.

Mr. HALL: I will offer B376 in evidence.

A. I was here when they commenced on the first crib.

Q. Now, Captain, I wish you would detail to the appraisers the general nature of the work there and the difficulties that had to be met with in reference to cribbing?

A. It would pretty near fill a book. I don't think there was a rougher piece of ground laid outdoors than this was when we started here; with ravines, deep ravines down to the bed rock coming in right through to here, so that the water set way back up into these ravines, and it seemed to have been an endless job to complete that amount of work to get the ground into shape. At the same time it did not seem there was any other place to put in, as far as I know about. I don't know of another place. The river front, the rock extending here level, and being shallow water here (that is, shallow for this river), so that it is easy to reach the rock with permanent work. I don't know of another place within hundreds of miles of here. It is the place and the only place it was feasible to

705 build on, for several reasons. One was, there was a city growing, a city then of about 50,000, 40,000 or 50,000 growing rapidly, as you can all see. There was the sewerage to come in in the City of Omaha. This big North Omaha sewer has come in almost up to Florence. The sewers were to come in; there was no permanent place, except to build on the river muck, anywhere below here; and that with the sewerage of Omaha and the expenditure of the money, it did not seem to be practicable at all to build down there or attempt to build there, with the sewerage.

Then the next thing was, where are you going to build? Was to look this matter up and find out where was the best foundation, and where you could get to the river; and we found here, when we came to these hills we got above the sewerage of Florence; Florence had already noted sewers, about to be instituted, and we were above the whole of it. These hills cut them off. Now, then, Mr. Underwood, and myself talked over that matter a great deal. They came up here and looked it over and considered it the only feasible place to build; where we had these ravines and this rough shore to fight, but still there did not seem to be another place to go; and it was decided to go ahead with this work; and I think to-day that this work here was put in as permanent as any work was ever put in for any company in the world.

Q. Just what time did Captain Ruger come here?

A. He came here in 1887, I think.

Q. Now, when he came——

A. It might have been a little later. No, I think he came here in 1888.

Q. When he did come here did he confirm the views which you and Mr. Underwood already had?

A. Yes, I think he did.

Q. Now, in that connection, as one of the things which might be necessary to enlarge upon, what have you to say as to any change in the current of the river and formation as to any bars near the old river station?

A. Oh, well, there was no such thing as controlling the river at that time. At that time it was so far from shore to shore, and going

down on the Iowa side right tight to the Iowa bank, where it goes yet; and then cut across in there; it was a constant change of bars; sometimes the river was half a mile from us; and we had a great deal of trouble down there to get water sometimes, and are having it yet. It changes half a mile there sometimes in a few months, and gets back again; travels back and forward all over that territory.

Q. Now, Captain, was there, how about there being any sort of soil down there to hold such a plant as was built up here?

A. There was not.

Q. Calling your attention, Captain, now to B374, Page 132, being soundings and plan of riprap east of the basins, I will ask you to look at that and state whether that represents correctly the situation there on the river as to extent of riprap and the location and the soundings in the river?

A. Well, the soundings I don't know positive about except our cribs. I think that lower crib was built forty feet high. I don't know just how much of it is out of water at the present time, but it is down to bed rock. We put on the hose, you know, and washed it. We put in a thorough water works system here, and three of our upright big boilers and pumps and laid a regular system of pipes, and we washed everything to bed rock and right down clean and they have never settled. We loaded them with stones as we put them in there. They were completed and floated down to that place, held with large cables. We got them exactly where we wanted them and loaded the stone in and loaded them down. They are built from the rock solid up to the top.

Q. Is that plan so far as it relates to the plan of riprapping correct?

A. Why, I would think so. Let's see; one, two, three, four, five, yes. Yes, that is all correct. That was the first crib put in. We went right into that bank when it was forty feet high there, and the bank was falling in on top of them every day, but it came extremely cold weather and froze so it stopped washing so we got that crib down, and filled them along, those three, during that cold weather. It was found out that the minute the frost got out you couldn't put any stone work over here at all; it would slide and carry it away and you couldn't find it. Had to wait until winter and build this.

The willows were bound in small bundles and laid down and then laid the other way and bound together with wire and then put on a coat of stone, and then the willows, and then stone; built up there, some of it is thirty feet deep. It is built all the way up in that way. There isn't any earth or anything filled in there at all except what is amongst the stone filled in after it was built. There was no dirt used inside of that.

Mr. HALL: I will offer that plan in evidence.

B374.

707 A. And the way that the work was done is shown out there plainly, what it was. It has never settled or give any direction and never will now.

Q. I will ask you to look at that, B372, showing the construction of the crib, and state whether that is the correct representation of the way that crib work was constructed?

A. Yes sir, that is, the way it was done. The object in this was was so that the stone would catch on here and always help to carry down. It could not float up for the stone work but it was all zig zag and the stone ribbed into this timber, so it made a ragged wall up and down for the stone to hang onto. It was all put in there like that with white pine. It was bolted together. Have you got any bolts to show there? For instance you would have a bolt there with the head under the bottom and bolt that timber up three or four timbers—I don't remember which—and slide these on and put on a nut. Bolted from top to bottom and this stone work built in on this timber all the way through from bed rock to the top. That is correct.

Mr. MEAD:

Q. Is there a bottom in these cribs?

A. No. bottom. Well, I say "no bottom." I am not very certain about that.

Mr. MEAD:

Q. Well, the statement was made that they were floated into place and then sunk with the stone?

A. Yes.

Q. What would hold the stone in?

A. Those cribs, as you understand, were thirty or forty feet high and put in there in the winter time when there was not more than fifteen feet of water, and there was weight enough of their own weight to sink them.

Q. I see.

A. I don't remember of there being any bottom in, Captain Ruge will remember that; but they were made of white pine timber. They were planked on the outside with two inch oak.

Mr. HALL: I will offer that in evidence B372.

Mr. HALL:

Q. Do you remember, Captain Reynolds, that lower crib getting away?

A. I remember it made things hustle; and the second crib they put in, also. Would drift twenty tons easy, and I guess more than that. It broke several times.

Q. I would like to know now, Captain, to just state the magnitude of that work, so that the appraisers may get a general
708 idea of how it was conducted and done with respect to the river work here east of the basins, on the Nebraska side?

A. I haven't got the figures of the exact width and depth; I only know this; that work was put in in a thorough manner, a large amount of stone, and it would range probably from fifty feet to one hundred feet in width, and it varies according to the shore. They carried a straight line along and the shores were uneven, but this line

where our cribs are here, I should suppose was about 125 feet. Our intakes there and the other ones, perhaps 50 or 75 feet in length and they were built to above the high water mark of 1881, all of them; filled with stone that high and planked with white oak plank spiked on with bridge spikes.

Mr. WRIGHT:

Q. White oak or white pine?

A. White oak.

Q. You said white pine awhile ago?

A. The timber is white pine but the plank on the outside is oak.

Mr. HALL:

Q. You know this loose rock wall down here east of the basins?

A. Yes.

Q. What is the fact as to whether that rests on the bed rock or not?

A. Well, I would not want to say positively about that resting on bed rock.

Q. Who would know about that?

A. It is on the stone work; it is way down into the stone work, but I don't think it is on bed rock. Well, Captain Ruger I guess, was conducting that work. But I know how the wall was put in and I know it is on rock at the bottom, but that rock at the bottom was the rip rap work we put in in the first place, and built this on the top of it.

Q. So that this wall, with the riprap below, goes clear to bed rock?

A. Yes sir.

Q. Now, when you spoke of the width of this riprap work, you did not, of course, include the long cribs that there are there, in giving the width at 50 to 75 feet?

A. No, that is from shore out to the end of the cribs; square out, is what I meant in width of the rip rap. The piers, of course, are longer. But square out from shore. This is simply guess work I never measured them in the world, but I have walked over them times enough. I presume they have got the measures of them exactly to the foot.

Q. Now, the fill-in behind that work down there; where did that dirt come from?

A. Why, come out of these hills up there, these streets, these great high banks that you see.

709 Q. How far did that have to be hauled?

A. I should judge about half a mile.

Q. How was it with regard to the dirt that was used to fill these deep ravines that you spoke about?

A. I think some of that came out of the basins. Others came out, when we ran short, off the hills, the big cuts in the streets.

Q. How deep were those ravines, Captain, just approximately?

A. I think there was one ravine there that was seventy feet. I think it measures about seventy feet to what was the bottom of that

ravine. We drove piles, 50 feet piles in there to build on and they were not as long as they ought to have been, but we couldn't get any longer for white oak piles. They were drove in there and built up on top of those. This railroad out here had a double bent pier that they got across, trestle. Forty feet that trestle was.

Q. Crossing the ravine?

A. Yes. That was way up at the upper end. That was not in the deepest part.

Q. Where did that ravine extend between, where on the ground now, between what basins?

A. Between number 3 and number 2. And there is a big tract of ground in there that we filled and didn't dare to put a basin on because of settling, and it has settled so we have filled it up, I think, the third time. It has stopped settling now. We didn't dare to build a basin there for that reason. That was down so that the river flowed right in there; there was a pond clear up by the railroad bridge about that elevation, I think, we have something like seventy feet there now.

Q. What would you say was the length of the ravine, Captain?

A. Oh, I would say six or seven hundred feet. It stopped just north of that; just at the west of the railroad culvert in there. There was a deep spring hole in there, and we were compelled to fill that. There was seventeen feet of water after the sewers were laid through it taking the water away, there was still seventeen feet of water in there above the railroad. The City of Florence was going to bring suit against the Water Company, which they considered feasible, and the Water Company filled that ravine. There is a little water scatters over there now at high water.

Q. This hole, was that on the Water Works Company property?

A. That was on the City. The ravine, main ravine was all on the Water Works' property, but the upper end of it, the terminus was in the city property.

710 Mr. BENZENBERG: I would like to ask in connection with that, a question or two?

Q. Captain, was the surface of the ground at the upper basin at its present elevation or are the banks of that upper basin made by fill?

A. Made by fill, the upper ones, 4 and 5.

Q. About how much?

A. Oh, I would think perhaps fifteen feet.

Q. When the water, when the river had eroded upon that bank, cut in on the river bank, how close was the upper edge of that wash-out to the present roadway east of the basin?

A. Well, the river never got much nearer at that point, at the lower end there. Well, perhaps, thirty feet nearer than what it is now. The river cut in there. You will see by the old railroad track that runs there that it runs in to the bank, I should think, thirty or fifty feet in to the west of where the river runs now. We filled out there with riprap and stone work. It got pretty close up there and cut so the bank gave way under the tremendous strain of water, the load above. The bank gave way and even our watch house went

to the river, and our fence, but that was all built up again; all ailed by teams, and built that bank a second time.

Q. The fence, you say, went in?

A. Yes, sir; part of the fence there by the watch house.

Q. A fence where the fence is now?

A. Yes sir. The whole bank slid and went down into the river and that was all built up a second time, and then this big wall was at in. It slid down there, the whole riprap, went out over the old prap; then they went to work and filled in and built this big wall there down on top of the old riprap stone and foundation, and put up there; it is a tremendous wall, too.

Mr. HALL:

Q. Now, calling your attention to B371, showing the map of the prap on the Nebraska side, I will ask you to state whether that is substantially the character of the riprap as it is laid in at that point?

A. Let's see. Which one, is that number one?

Mr. WRIGHT: Here is number 1.

A. Oh, yes, Nebraska.

Mr. HALL:

Q. Yes, I am talking about Nebraska.

A. That is our intakes, there.

Mr. WRIGHT: They show up, you see, Captain, over here.

A. Well, according to my recollection that is about as near right as you could make it. This was, as I told you, was laid in 11 bundles bound in wire, and filled on top; then bundles and then stone. We built up those cribs, some of them, forty feet and whatever is out of water, and the rest is solid work down to bed rock. It don't lay on the mud. We had that water work system in here and washed the mud off. It never settled a particle, any of it.

Mr. HALL:

Q. All of those went right down to bed rock.

A. Right down to bed rock. A great deal of pains taken and a great deal of money.

Mr. WRIGHT: You are referring to the riprap themselves or between the cribs?

A. The riprap themselves. We found out that we could not put that work in there without building the cribs. The water would sweep the whole things away. We built these to make dead water there and then built this one by the other. This represents the rock line. Here is where our track is up here. And that is substantially the way that work was done.

Mr. MEAD:

Q. For how great a width was the riprap carried to rock?

A. Nearly the whole of it I think. We filled it all the way with willows, all the way back, and stone. I think there may be a little of this end—I guess that represents it—this end that we did not wash the rock; but the most of it. For instance, at our cribs here where our intakes are, when we had two feet of the crib standing up on the ope—it is seven feet on the rock outside—so there was about, that

was about five feet, yet, that was on solid rock; take a bar and pond right along. And this slope shows here so that I think that that pretty nearly means bed rock all the way.

Mr. ALVORD:

Q. I have received the impression from the testimony which had been given heretofore, that that wall which holds the bank, the stone wall rested on the rock which in turn rested on the bed rock?

A. Well, that is what it is.

Q. The drawing don't quite show that?

A. The riprap, the original riprap in there, we will say, came in there to that line, and when this bank slid out, then we came back in here and we went down to that old riprap rock we put in there, all that bed of rock, and built on that all the way.

Mr. MEAD:

Q. The drawings seem to show a line represented as the rock line?

A. Yes.

712 Q. I should say that perhaps fifteen or twenty feet on the river end is shown as going down to rock?

A. Yes.

Q. Then the balance of this seems to rise above the rock? How far back from the edge would you say this had been carried down to the solid rock?

A. It is down, it is back thirty or forty feet. This was carried back, washed out. We did that washing just as carefully back here as we did there, and put that on rock. If we didn't the whole thing slid. And Captain Ruger wanted one of the fellows to let the thing go; it would fall down again.

Mr. HALL:

Q. Well, does that represent it substantially, as it is, as you understand it, Captain?

A. Yes, I think that is a very good representation of it.

Q. As to quantity and location?

A. Yes. I know it is all stone work and willow work and put in there as good as it possibly could be done.

Mr. HALL: I will offer B371 in evidence.

Mr. MEAD: There is one point that seems to me should be cleared up here in regard to this matter; the testimony shows that this wall rests on the riprap and that riprap under the wall was carried down to solid rock. Now, these drawings do not show that condition. It shows that the riprap below this wall rests on the surface of the earth and that the rock is a considerable distance below there. Now, one point the Commission would like to know is our exact condition in regard to that.

Mr. HALL: When we come to exact details I suppose we have got to rely a good deal on Captain Ruger about that?

Mr. MEAD: I thought that was a point, was all, and we would like information in regard to it.

Mr. HALL:

Q. Now calling your attention, Captain, to B377, page 134, detail plan and elevation of the intake crib, I will ask you to state whether that detail plan and elevation of the intake crib correctly represents the crib as it is?

A. We found out that we could not get the water in here. It would not come in. The strong current there would carry it by. Didn't have room enough to get it in there. We used to have our screen in there, and I went to work and built that out there and ran our pipes through into it and I never had any trouble since; and that is substantially the way they were built.

Q. I will ask you Captain, whether it is correct as it is represented?

A. It is correct.

713 Mr. HALL: I will offer in evidence B377.

Q. Now, Captain, recurring now to the river work on the other side of the river, the Iowa side, I will call your attention to Exhibits—calling your attention to those two pages and pictures, Exhibits 1037 and 1038, I will ask you whether they represent the way in which the work was carried on on the other side and the character of the work on the other side of the river?

A. Well, that seems to be about the way it was done, yes sir; except of course, we had very much work to do afterwards. That is added to it.

Q. I am only offering those to show the character of the work; that is all, not the complete work?

A. Yes.

Q. Look at the other page, also, Captain, if you will, and state if those are correct as you see the work progressing?

A. Yes, sir, I think that would be all right.

Mr. HALL: I will offer those in evidence. Exhibits 1037 and 1038.

Q. Now, Captain, will you describe to the appraisers the nature of the work done by the Company on the other side of the river?

A. Well, the work commenced with Number 1 crib at the turn, in the form of a crib put in of white oak piles fifty feet long, filled with willows inside, and they were bound together with oak 8 x 8 timber to strengthen them, and covered with plank outside, and ironed. That is the first crib. Then on the ice we built a mat braided in fine shape, I should think about two feet thick; braided it around the piling; braided it fifty feet wide and way around to the end, because the eddy cuts worse than it does on the face, and loaded that with stone about, perhaps eighteen inches thick and sunk it there so it should not get hold of the bottom of the piles to wash them out. I believe there wasn't any danger, because I believe we went to bed rock there. Then on the following year we went to work and built long fa-cines. I think we built a continuous fa-cine along the whole length of that crib, against the piling, and took wire cables and wired them to the piling. Then we built another mat on top of that and loaded that with stone again. It was a most

important thing that we should hold that point as we had lost 485 feet already. And then we filled it in back—already put in hundreds of tons of willows and stones in there, in that work in there behind the crib so it should not get around under there. Then we put this crib in, and then we put in this crib. That we called a willow dike,

we built ourselves, we put in willows there that would scare
714 a man. The stone fa-cines were made anywhere from 75 to 150, and I think some of them 200 feet long, loaded with stone on the inside. This is the up-stream. We hung on here with a heavy cable that goes into the middle of the fa-cine. We built it on the bank and laid on like this: rolled them over and the current would take them and lap them back; and worked in there above it and in there above it until we got into this current. And this, the river ran in here, and we went back down here and came up over that, and went over it two or three times in the one winter; and so on down, by rolling these over, we put in all the work; on top of this. Now at that point we put in a willow mat all the way around there; and built the fa-cines, and built an apron all over that and came on up here. There was one of the hardest points we had, right there; the river struck that place.

Q. What point is that?

A. That is Number 1 willow dike, I guess. That is what we used to call it.

Q. And if, when you are testifying, Captain, you will name the place, the reporter can get it down and when we come to read it it will read clear.

A. This is number 3 dike. Crib Number 3, and that is, well there is a large amount of work put in there. There is two aprons, one above the other, built in there after the second year, we put in there and loaded it down with stone, we put in a mattress there. That cut in there is the worst spot that we have.

Q. In there, you mean right in west of Crib 3?

A. Yes; there we put in a mattress.

Q. That is east of Crib 3?

A. East of Crib 3.

Q. Describe that work, Captain, will you please?

A. That work is mattress, I should think, three feet thick; very heavy mattress loaded with stone. There was cables put underneath it all the way through and then pulleys on top of it and wired from one to the other and all wired together and all filled with stone, loaded it solid with stone; and not only that, but clear around this Number 3 crib; and that is the way that work was put in.

Q. How far down was that work carried, Captain?

A. We calculated we went 35 or 40 feet. It would settle down and then we would load on top of it; kept loading on until it stopped settling and became solid. Of course, what is above water will run away, and what is below water had to be there if we was to do any kind of work, we couldn't keep anything there until we got the foundation. Well, we have got a foundation below water which will never rot, that is below water. We expected to have to top out the top of it with stone.

715 Mr. ALVORD:

Q. When you say down 35 feet do you mean the outer edge of the mattress?

A. The outer edge of the mattress, and all these cables from these fa-cines come back on this line, with dead men put into the ground back here, and we used to leave quite a good deal of extra rope, and as it kept settling we slacked away so as to not part there. Used half inch cable. Go down and find it was pulling the anchors up and slack them away until they stopped settling. I think that is bed rock, every bit of it.

Mr. MANSFIELD:

Q. You mean all of that number 3 rests on bed rock?

A. Yes.

Mr. HALL:

Q. You mean from Number 3 to Crib Number 1?

A. Yes sir. I think every bit of that is bed rock. We found out very quickly when it was not bed rock, because it would settle down. The water would come in under and move it down. And it don't settle at all, and there ain't any part of that settled.

Q. Now, calling your attention to willow dike number 2—well, first, have I called your attention to B300-710?

Mr. MANSFIELD: No, you have not.

Mr. HALL: Let the reporter show that this examination, all this examination is with respect to B300-710.

Q. Calling your attention now, to willow dike number 2, what can you say as to how that was built, Captain: now how was that built, Captain: willow dike number 2? Without going too much in detail, Captain, about that, does this map B300-710 correctly represent the work there as you know it to be?

A. All this, I was on, myself, with Mr. Harris.

Q. All this, you mean from crib number 1, to crib number 3 and the willow dike just east of it?

A. Yes.

Q. A mattress, you say it was?

A. Yes, he put that in in the summer time.

Q. Are you acquainted, in a general way, with this work going from crib number 3 to the Government Revetment?

A. Yes, I was here when that was done.

Q. That is the Government Revetment?

A. Yes; that Mr. Harris himself done.

Q. By "that", you mean willow dike Number 3?

A. No, that is not number 3.

Q. Yes, it is.

716 A. Willow dike number 3. There is one of the strongest pieces of work there is on the river.

Q. Down at Pigeon Creek?

A. Pigeon Creek.

Q. Just state to the Appraisers how that is built, Captain?

A. The people over there that owned that property gave us all of this land in here; well, running way down here, way down to this crib along here, and way over to, well, clear into the bluffs, almost; gave us the right to go anywhere and cut whatever we wanted to, and we cut off a good many acres of cottonwood and grapevines and willows; everything there was growing, big trees, bound the limbs down and cabled them back in there at that point. We filled it up way above water line, and it sunk down, and we filled it again, and it sunk down and we filled it a third time, and loaded it up with stone, and it is there yet and will be there when we are gone. There are thousands and thousands of cords of willows went in there, and wood, loaded with stone. We had a [*pike*] of stone there half as big as this house, that we hauled up there.

Mr. HALL: The witness is now speaking of willow dike Number 3.

Q. Do you know how deep down you went there, Captain?

A. Well, we went down, we calculated, between 30 and 40 feet at that. It is very deep to the rock there.

Mr. ALVORD:

Q. You mean by that the outer edge of the crib?

A. The whole thing went down. We kept building out and piling on top and loaded it down. It was a tremendous piece of work. We worked there three different years.

Mr. HALL:

Q. About how many acres of timber would you say you put into that, Captain?

A. I should say we put in, I should think 50 acres of timber and willows and like of that stuff that we put in. We cut all one winter ourselves. Now, I was not here when all this work was done. Now there is a place that we put in.

Q. By that you mean?

A. That is the Government Dike.

Q. No, that is Crib Number 4?

A. Yes, Crib Number 4. The water came around this end.

Q. Who built that, Captain?

A. That was built by Mr. Jones, employed by the United States.

Q. Built by the Government?

717 A. And the water went right there, so we went to work and built in fa-cines into that, the same as we had done below. Put in an apron and rolled the fa-cines over way up here and made that solid, which has never given since.

Q. I notice that map does not show a mattress just directly east of the Government Dike?

A. I don't think we put a mattress in there; not properly. We filled it with willows, and then put in the fa-cines.

Q. It doesn't show any riprapi work in there, that map?

A. I know, but it is in there all the same.

Q. About how much would you say there was of that?

A. I guess they done that; their work is straight line and straight crib, and that they built this in here.

Q. Well, would that, then, this line here represent their crib?

A. Yes.

Q. And is this your work?

A. We did not go out here?

Q. Could you tell about how many feet there was of that, Captain, approximately?

A. I couldn't tell.

Q. A couple of hundred feet?

A. 150 or 200 feet probably. There has been considerable work done there that I didn't have anything to do with, but I know this was our principal work, over here. There is another crib above this.

Q. Yes, there. Now, these, this work here, which is called, fa-cine wing mattress, calling it, then, fa-cine mattress- 2 and 3, what kind of work was that, Captain, do you know?

A. That was, let's see. Where is willow mattress number 2, there?

Q. I am counting from here, you know. There is willow dike number 2 and fa-cine mattress number 2 just below willow dike number 2?

A. From willow dike number 2 down to this crib number 3, is heavy mattress put in there, loaded with stone all the way in that distance. In the first place we put in about two or three hundred feet of it, and then old Mr. Neal, he was the patentee, or claimed to be, of this business, he put in an apron in there, but we thought it was not sufficient and built another one the next year right on top of it, and loaded it with stone so that from Willow Dike Number 2, all the way down to Number 1 is all solid work, and outside of that there is one small crib there, I guess, that we put in in the summer time when the water was over the bank and we thought it was going to wash us out behind our work, and we put in some work there and it is there yet, just below the water line. That never was connected up with the rest of the work.

718 Q. Well, generally speaking, Captain, does that map B300-710, represent the work on the other side of the river?

A. I should say it did pretty well. As I told you there is some of this work that I have never been on at all.

Q. And I suppose that there are some matters there that you think are omitted from this, that was put in, that don't show on that map?

A. I wouldn't wonder if there is a good deal in there. We have done an awful lot of work on that over there. Nobody has any idea of that stuff we put in there.

By Mr. HALL: I will offer that in evidence.

Q. Now, Captain Reynolds, this morning, in speaking of some assignment that you made to the Omaha Water Company, of your rights under this patent, to use this system of sedimentation that you put into these basins, you stated, that was to be given to the Company simply while they held the works. I will ask you whether

that agreement was not in writing with the Omaha Water Company?

A. Yes, that is in writing. I didn't take much notice what the meaning of that was when they asked me. That is in writing, the whole thing, and I should supplement the writing if that is to go in as evidence. I don't know just what that was, but we have it in writing.

Q. Isn't it a fact that there was some talk at that time about the assignment being in that form, but afterwards it was put in writing?

A. Well, I know there was, and I think myself it was changed. I don't think we considered that at all, because it would not give me any rights at all. It is in writing. Whatever the writing is I am ready to stand by. I don't know whether it is in our office or Mr. Hunt has it.

Q. We have the writing in the office and will produce it at the proper time?

A. All right. I didn't take much notice of that. Mr. Hunt has a paper, I know, and he showed it to me when I was sick.

Q. Well, I have the assignment now, Captain, I have it in my pocket?

Mr. WRIGHT: Mr. Hunt has a different paper.

Mr. HALL: A copy.

Q. Now, Captain, calling your attention now to B300-58, I will ask you whether that correctly represents the smoke consumer system in the pump house here?

719 A. I think it does. I think that is made from the original drawing.

Q. Now what is that smoke consumer?

A. Well, it is a simple construction, the way that the brick work is done. We burn the coal in brick instead of trying to burn it in iron. Iron is never hot enough to ignite the gases of coal, and the consequence is that we get as big results as anybody in the United States, I guess. We have no smoke. It is not one time in a hundred you can tell this plant is running. We get good results; first class. It has been running there for fifteen years.

Q. Is that a patent of your own, Captain?

A. Yes.

Q. The Company has the right to use it?

A. They have a right to use it, the same as they have the other, and that is all in writing; I think signed by Judge Woolworth, and I don't know how many more.

Q. Now, Captain, are all the—is the whole plant equipped with this smoke consumer?

A. Yes nearly. I don't think all. Some of the old boilers I don't think I ever changed over; whenever we had to tear down a boiler we put them in. Poppleton Avenue and Walnut Hill are both complete in this form. They are horizontal boilers, but the same device.

Mr. HALL: I will not offer that in evidence now, seeing you have not seen it. Give you a chance to look at it. (Addressing Mr. Wright)

Mr. HALL:

Q. Now, Captain, in testifying this morning you spoke of the riprap work down at the river station by the Union Pacific. I want to ask you whether you meant by that to say that no rip rap work was done by the Water Company?

A. I don't know. There was lots of work done before I went there; and I have heard them tell about a large amount of work the Water Works Company did to keep from cutting out their lower water basin, and I don't know but you can go there to-day and find some barrels of Portland Cement and sacks down there.

Q. The fact is you don't know about that?

A. It was done before I went there.

Q. How about any rip rapping work done since you came away?

A. I think Mr. Taylor carried on a piece of work, a lower suction, one of our suction pipes that slid, the stone work gave way and crowded out, pulled the pipe out, and lost a length of pipe, and they done some work. I don't know how long it was after I came away from here.

Q. As a matter of fact you don't know about the rip rap?

A. I don't know, only as I tell you, the rip rap was all done before I came there, except this little piece was done around our suction pipe. I don't consider that as substantial rip rap. The substantial riprap in front of the engine house, the old St. Louis bridge pier, where they used to land, and the heavy stone work was put in before I went there; and I heard them tell about up by the powder house, above there, how many thousand loads the Union Pacific put in there to fill that; but between the engine house, along about at the engine house, as I understood, after the Water Works Company went there they said, "Well, you protect your own property," and they went to work and put in, to protect themselves—the Water Works had to put in. That was the story I got. Had to put in there and they dumped in cement and everything that they had; worked there night and day.

Mr. WRIGHT: I don't suppose you claim it to be material, what he heard.

Mr. HALL: Oh, no; I wanted to let him be heard.

A. As far as I am concerned, I was not there during that work. Somebody done a large amount of it. That is certain.

Whereupon, at 2:45 p. m., the Board of Appraisers took an adjournment to permit an inspection of the riprap work along the river, to convene again Monday, October 24th, A. D. 1904, at 9:30 o'clock A. M., at the Minne Lusa Station, Florence, Nebraska; at which time the following proceedings were had, viz:

By agreement of all parties, hereto, the further taking of testimony was adjourned until 10 o'clock A. M. Thursday, April 5, 1906, to be resumed at the same place, to-wit: Room 429, Omaha National Bank Building, Omaha, Nebraska.

Thursday, April 5, 10 o'clock A. M., all parties met pursuant to adjournment, at room 429, Omaha National Bank Building, Omaha, Nebraska.

Present: C. C. Wright, Esq., Solicitor for Complainants. R. S. Hall, Esq., James M. Woolworth, Esq., Solicitors for Defendants.

Proceedings were as follows:

WILBER F. HAWES, was called and duly sworn as a witness on the part of the defendants. Being examined in chief by R. S. Hall, Esq., — testified as follows:

721 Q. Mr. Hawes, you may state your full name and place of residence?

A. My name is Wilber F. Hawes, residence, Denver, Colorado.

Q. What business are you at present engaged in, Mr. Hawes?

A. At present I am with the Denver Union Water Company of Denver and assistant engineer in charge of the draughting room and records of the engineering work.

Q. How long have you been assistant engineer there in Denver?

A. I first went to Denver in the year 1890 with the American Water Works Company, as assistant engineer in charge of construction work of the remodeling of the Denver Water Works and I remained there ever since except the year 1892 when I went to Fort Worth and took charge of the contract under the city of Fort Worth for rebuilding the Water Works system there. I was assistant engineer in charge of the works under the city engineer of Fort Worth.

Q. Are you acquainted with the Omaha Water Company's plant here in Omaha?

A. I commenced work for the Omaha Water Company in the month of July, 1887, and worked for them up to the time I went to Denver, which was about the first of January, 1890.

Q. Were you engaged in the construction work out at Florence?

A. That was the first work that I did for the Water Company. I was engaged by Mr. Wiley through Mr. Andrew Rosewater, to make surveys and location of the Florence basins.

Q. What work did you do out there, Mr. Hawes?

A. The first work I did was to ascertain the block lines so as to ascertain the division lines and land lines that the water Company had purchased there. Then after that I ran levels and locations to locate basins Nos. 1 and 2, make surveys and plans for the same, and the contract was let for the excavation.

Q. Were you there when the excavations were made, did you see them made?

A. I was on the excavation work from the time it was begun in 1887, in the fall, I think it was, up to the time that I went to Denver, January 1st, 1890.

Q. You may just state, Mr. Hawes, the character of the work done out there on the ground?

722 A. Well, it was large construction work there, for a system for which the water was to be taken from the Missouri River, to furnish Omaha with water, and it consisted of construction there of a series or a number of basins, 7 basins in all, I believe, and a

pump house and appliances necessary, and the intake from the river, and of protection work along there.

Q. Speaking now, Mr. Hawes, of the work done on the grounds where the basins were, and from the pump house up, what was the first work done there?

A. The first work that was done was the excavation for basins numbers one and two, then following right closely afterwards was the foundation for the main portion of the pump house and boiler house.

Q. Before this first work of construction what was done with reference to clearing off the ground and leveling it up?

A. Well, the ground where the basins was located along there—part of it was occupied as truck farms, and it was covered with trees and underbrush and buildings. All had to be cleared off.

Q. How about leveling the ground?

A. Well, the first that was taken from the reservoirs was used to level off a large ravine which was on the north side of basin No. 1, between basin No. 1 and the pump house, and on the south side between basins which were number three and four, two small basins. There was a very deep ravine there and the extra surplus dirt was thrown in there and also thrown over the bank towards the river where we could distribute it most easily and make the shortest haul to dispose of the same.

Q. Were you there when the fence was built around the basins?

A. The fence proper was being built—I wasn't there, but I made the survey for the iron fence which was being built around the basin. That was about the last thing I did before leaving for Denver—was to make the survey and plans for the iron fence which is now in place around the reservoirs, or basins, so that the same could be sent to the manufacturers to get out—the exact dimensions—as they were all iron posts, is my recollection of it, and had to be very accurate.

Q. Do you remember anything about the fence outside of that, Mr. Hawes, the fence that went around the grounds outside of the fence that went around the basins?

A. No, I do not, personally.

Q. Referring now, Mr. Hawes to what is known as the river protection there, the riprap, were you there when that was constructed?

723 A. Well, I *am* there during the construction of the portion that was constructed up to the time I left in 1890.

Q. When was that commenced, Mr. Hawes, do you remember?

A. It was some time in 1888, but I couldn't say the exact date or the exact time, rather. I think after Captain Rugar came in the employ of the company which was sometime in the latter part of the summer of 1888, or early in the fall.

Q. Do you remember the circumstances under which that heavy riprap was put in, east of the basins?

A. It was put in on account of the fact that we had been—prior to the—well, I think in 1887 there was no river cutting along there; there was quite a lot of underbrush at the foot of the embankment,

and outside of the railroad track that ran along there. In 1889 the river commenced to suddenly cut into the bank there and it became necessary for protection of some kind, to take the precaution to protect the banks.

Q. Describe the nature of that cutting and what effect it produced?

A. The river, on account of the bend above, cut a water course on the Nebraska side and undermined the banks and the same kept sliding in. There was a point it come in alongside the river basins and took the railroad tracks out entirely, and began to cut across some there, and the banks became almost vertical. I wouldn't say exactly vertical, but somewhere about the natural slope that the clay would stand. Also cut in very rapidly up where they proposed to put in the intake, and it became necessary to take some precaution to protect this.

Q. You may state what was done with reference to protecting that bank at that time?

A. Why there was designed—I think by Captain Rugar—I drew the plans for him under his instructions—a series of crib work to be weighted down with stone and to be swung out into the river, and then in back of all this it was to be protected with heavy willow mattresses—mattresses of willows and stone, the same being placed along through there so as to be an absolute protection.

Q. How much of that work was done there, Mr. Hawes?

A. Well my recollection is that it runs somewhere in the neighborhood of 3,000 to 3,500 feet along there—all together, along the river front, and in the neighborhood of 100 feet wide projecting out into the river. That is, including the riprapping and the timber crips that were placed in there to divert the river, the water.

Q. How long were the timber cribs, do you remember?

A. Well, they ran in the neighborhood, I should say, from
724 150 to 200 feet, more or less, on account of being placed at an angle in the river.

Q. You are giving this distance, I suppose, just approximately?

A. Yes, sir, just approximately. I haven't measured them lately and I don't remember them exactly.

Q. Just state how they were made and constructed?

A. The cribs were constructed of timber 10's p-aced one above the other, those being heavily spiked with bridge spikes, and additional bolts placed along at various distances. I don't remember the exact distance now. Also it was formed in compartments of about 4 or 5 feet in width, and where those compartments were they were tied across with heavy timbers 10 x 10. Instead of being vertical, one over the other, they were placed zigzag, so after being filled with rock the rock would hold them down and keep them from floating.

Q. What would you say as to the character of that construction, as to whether it was permanent or not?

A. Well, I should say it was permanent from the appearance of it at present. As I saw it yesterday it didn't seem to have settled—didn't seem to have changed any since I saw it last time, which was, I think in 1897.

Q. Can you give any idea of the magnitude there of the work of filling in that riprap stone?

A. There was a large force of men and teams employed there for quite a while, for a year and a half at least, before I left here, hauling willows from the other side of the river. The willows were brought across in the winter time on the ice and in the summer time in a boat—and trainload after trainload of stone was brought in there and dumped in there, and the amount of timber used there looked more like a saw mill yard than anything else. They employed a large force of carpenters, and laborers for placing the rock and making the mattresses out of the willows, and placing them in place.

Q. You may state whether or not the timber was framed before it went into the cribs?

A. Yes, the timber all had to be cut and framed and dimensioned so as to fit in place when placed in the cribs. This was all framed on the grounds and then afterwards placed in position out in the river. It was built along there parallel—when they first commenced building it the foundations were built along the side of the river bank and put together, and then afterwards floated in position and anchored by guy ropes in the proper position, and then they weighed the cribs by means of rock on top and sunk them down to their proper place and then filled the compartments after they were sunk down to bed rock.

725 Q. In what way were they brought down to bed rock, Mr. Hawes, the cribs?

A. Why the exact details of that, I don't remember at present. I know they were anchored out by using block and tackle and guy ropes to the banks, so as to hold them in position; but what method they had for sinking them down to bedrock I don't remember just how it was.

Mr. WOOLWORTH: How far was it down to bed rock?

Mr. HALL: It varied; some places it was quite a distance and some places near.

Q. You may state Mr. Hawes what was the necessity for that heavy work at the time that this was put in?

A. If the river was left alone to cut in the way it appeared to be cutting in then they would have had to abandon the construction of the works up there. It had to be taken care of in some way.

Q. What would you say as to the necessity of making such protection as was made there?

A. I think it was the only precaution that could be taken.

Q. There was some testimony given in this case, Mr. Hawes, that at an expense of about 10 dollars a running foot, some what is known as standard government work would have protected that bank there. What have you to say in respect to that?

A. Well, not knowing what the standard Government work was, I couldn't say, but it seems to me that 10 dollars a foot would have made no protection at all, from what I have seen of the amount of rock dumped into that river, not alone at this place but at other

places on it, 10 dollars a foot would go out like so much sugar dropped into the river.

Mr. WRIGHT: I move to strike out all the last answer after the statement that he don't know what standard Government work is, as being volunteered testimony and incompetent.

Q. Assuming the standard Government work to be the kind that has been put up and down this river—you have seen some of that haven't you?

A. When I was a boy I noticed out east of the Union Pacific shops there some government mattresses being built there of willows one time, and I stood there and watched the laborers and the engineers in charge of the work.

Q. Have you seen any of it up and down the river?

A. I haven't been to any of that lately, and I don't know whether it is in or not.

Q. Assuming that the standard work proposed for the Water Company to use is the work that has been put in
726 up and down the river by the Government, and that that work has gone out, what would you say as to the advisability or economy of employing that kind of work in protecting these basins?

Mr. WRIGHT: That is objected to as being incompetent.

A. I don't think it would ever give proper protection if the work has been put in and has gone out—what they call standard work.

Q. As an engineer, Mr. Hawes, you may state whether, when confronted with the situation which you saw there, whether you would be justified in taking any chances in stopping the river from cutting in?

A. No sir, I don't think I would; I think if there was any error at all it should be on the part safety, not in trying to make it as cheap as possible for temporary protection. It should be permanent.

Q. What is the fact, Mr. Hawes, as to whether the toe of that work there went down to Bed rock on the river front there?

A. Why from soundings that I made there for Captain Ruger, in places, I should say it was down to bed rock all along. If it wasn't in the time it has been in there, an undercurrent would set in and wash it out.

Mr. WRIGHT: I move to strike out the last sentence of the answer as being a mere statement of the conclusion of the witness, and as argument-ive.

Q. Besides the positions you have mentioned, what other positions have you occupied as a civil engineer?

A. I was city engineer in Omaha; appointed city engineer—I think it was in 1877. I had been prior to that working as assistant to the city engineer. Then after leaving the city I went to work for the Union Pacific railroad and was on construction work for 2 years. Then I was employed by the Union Pacific coal department from January 1880 up to August 1886. I went to work as engineer and surveyor of mines and was afterward appointed mine superintendent and then division superintendent. After leaving that com-

pany I went to work for the Missouri Pacific Company at Nebraska City on construction work one season. I came back to Omaha here and went to work for Mr. Rosewater, Christie and Lowe, collecting data at Wichita on a sewer system. When I returned from that Mr. Wiley, manager of the Omaha Water Company was looking for an engineer to start this work at Florence and I was recommended to him by Mr. Rosewater.

Q. Then you have been a civil engineer practically all your life, have you not, Mr. Hawes?

727 A. Yes, sir, I haven't followed any other work than that since I left school.

Q. Were you there, Mr. Hawes, in the employ of the Water Company at the time that retaining wall was built up along the bank?

A. I think the upper end of it was started before I left for Denver. The balance of it was finished afterwards.

Q. Was the riprap entirely finished when you left?

A. No, sir, I don't think it was.

Q. You don't know how much—

A. (Interrupting.) The lower end of it wasn't finished along by basins 6 and 7 when I left.

Q. Could you give in more detail than you have the magnitude and extent of that work. I would like to have you describe that as fully as you can; referring to the river protection work?

A. I first made soundings for Captain Ruger for the location of the upper cribs and my recollection is it reached 10 feet, and at one place it jumped off from 15 to 20 feet at the upper end of the work, and along down about the intakes, where I made soundings for the intake cribs, at lower water it was about 6 feet, and extreme high water, I don't remember what that is now. But it runs along, I should say, about 10 feet or something like that for the balance of the way down. In the construction of this—when Captain Ruger started it a large quantity of willows was brought over from the other side of the river, or around the immediate neighborhood where they could obtain them. They constructed willow mattresses by laying the willows all out straight one way first, and they were three or four feet thick, loosely, and then willows were laid cross-ways the other way and tied together and bound together with wire. This mattress was then laid out on the ice, and out into the water, so that they would occupy a space, I should say about 18 inches to two feet when weighted down by rock lying on top of them, in the neighborhood of about three feet of rock. Then they would take another mattress and lay on top of this layer of rock, forming the construction of it the same as before, and lay another layer of rock on top of that, and that was kept up as long as the rock and mattress would disappear out of sight, until it formed a solid mass, and then they kept piling rock on top of that until they brought it up to what was supposed to be high water line.

Q. Were you pretty well acquainted with the country around Florence, Mr. Hawes?

A. Well, having been brought up here from the time I was

728 about 10 years old we used to go up there swimming and hunting around there. I have been up and down there several times.

Q. I wish you would state in a general way the extent to which that country was denuded of willows by this work?

A. Well, I noticed yesterday standing on the bank looking across—

Mr. WRIGHT: We object to his answering as to what he saw yesterday, as not being at all responsive to the question.

A. (continued:) —that the ground was all denuded on the east bank of the river where it all used to be covered with willows and timber at the time we was constructing the basins at Florence, and on this side of the river for quite a ways in below the basins there used to be a large tract of willows and timber in there. That is all cut and washed out and disappeared.

Q. I will call your attention now to the way in which the willows were cleared off at the time the work was on, and what you observed with respect to that, while the work was being done?

A. Why it didn't look to be the same piece of country across the river. I could see farms along there where before they were not visible from the basins.

Q. About what extent of willows would you say, just speaking in a general way, was cleared off up there?

A. A strip of country there across from the reservoirs that I should think was about a mile in length there, and maybe two or three miles up the river that you can see there, that is completely cleared at present.

Q. After the country around Florence was cleared out where did they get willows from then, within your knowledge?

A. I don't remember at present where they did get them from. (Continued.) Most of those willows was out of my portion of the work—the contracting for them.

Q. I am only speaking generally. You may state besides those willows that were brought by team and boat from across the river, whether any were brought down by train from around in by Blair?

A. At present I don't remember.

Q. You don't remember how that was?

A. No sir.

Q. Speaking now, Mr. Hawes, of the extent of the stone that was thrown in there. Do you remember how that stone came in?

A. It was brought in by train on the railroad.

Q. Just state how frequently and in what way that was brought in?

A. Why I think there was from one to two trains a day used to come in there and was run up alongside of the river and unloaded—

729 after the track was replaced. At first they had to bring it up on the upper track and back down in from above and get in as near to the river as possible, and then it was hauled by teams to the river bank; then it was rolled down the bank by men and handled by men until they got it out in proper position.

Q. About what would be the size of those trains when they came in about how many cars to a train, approximately?

A. Well, that I couldn't say, the exact number of cars. The usual train load is from 25 to 50 cars.

Q. You do not remember exactly, however, how many there were?

A. No sir, the exact number of cars, I don't remember, that did come in on a train.

Q. Do you know what the fact was with reference to the washing out of the ground and track of the old "M. & O." road at that time?

A. Why in the portions along east of the basins it was washed out entirely, cut clear through the roadbed, cut right into the west side of the roadbed and the bank started to cave and wash down from the opposite basin No. 1.

Q. That afterwards was built out by the Company?

A. That was afterwards rebuilt by the Company or some party. In fact the Company rebuilt it out in order to get the rock along here in the bottom, after they got the foundation started for it again.

Q. When you say the Company, you mean the Omaha Water Company, or the Water Company at any rate, or the American?

A. Yes sir, the Water Company. I don't remember what the name of it was at that time.

Cross-examination.

By Mr. C. C. WRIGHT:

Q. Did it ever wash back clear to the west side of the right of way of the "M. & O." road?

A. It took the track out completely, my recollection is, at the upper end of basin No. 1, so that there wasn't any track at all.

Mr. WRIGHT: I move to strike out the answer as not being responsive at all.

Q. I asked you if it washed clear to the west side of the "M. & O." right of way, being 100 feet there, 50 feet on each side of the center of the track?

Mr. HALL: That is objected to as being a question based on something not proven, being a pure assumption.

A. The width of the right of way I don't know what it was.

Q. Well, it never washed so as to wash in quite all the grade of the railroad track did it?

30 A. It took all the grade out completely.

Q. How far west of the grade did it wash?

A. My recollection at present is at the north end of the track where it was cut right out completely. It was several feet west of the grade.

Q. What do you mean, the scriptural, six or seven or eight?

A. I should say in the neighborhood of 8 or 10 feet, somewhere in that neighborhood.

Q. That is 8 or 10 feet west of the——

A. (Interrupting.) West of the embankment that was supporting the railroad grade; the ties and rails.

Q. You were there in charge when they first commenced to survey out the grounds at Florence, weren't you?

A. Yes sir.

Q. You were in charge as engineer of the Water Company at that time?

A. I was in charge under the manager, Mr. S. L. Wiley, up to the time Captain Ruger came.

Q. Was you in charge as engineer or as assistant engineer?

A. Just as engineer. There was a superintendent of construction there who had charge of the building.

Q. Who was that?

A. Mr. Frank Fidler. He came after I had made the surveys and located the basins.

Q. You were locating the lots and blocks in the city there so as to see what property the Company had purchased?

A. The first thing I did was to locate the land lines so as to stake out the boundaries of the blocks they had purchased.

Q. When you constructed the reservoirs you constructed right over the streets, did you?

A. Yes sir.

Q. You had the consent of the city to do that?

Mr. HALL: That is objected to as not being proper cross-examination.

A. I don't know whether the Water Company had the consent of the city or not. That is a question that I don't know about.

Q. Don't know anything about that?

A. No sir. I was instructed by Mr. Wiley to lay them out there, and it was approved, and that is as far as I went into it.

Q. You drew the plans for the fence around the basins?

A. For the present fence, iron fence that is placed around the basins.

Q. Did you ever see any other fence around there before you left for Denver?

A. At present I can't recall it.

Q. Well, if you had charge up there from the start, and
731 there had been a fence, you would have known it, wouldn't you?

A. Well, there was a subdivision fence around pieces that were in cultivation at that time.

Q. You took those down when you started in on your grading?

A. Yes sir.

Q. I mean after you started your grading, if there was a fence all around this line of the Company's land you could have seen that if it had been there couldn't you?

A. I could—I recollect running a line along there by Captain Reynold's house, put a line in there for a stone wall, but the other fence I don't remember seeing, at present.

Q. You don't remember seeing a fence there, at present?

A. No sir.

Q. Yet you were walking over the grounds daily, and you would have seen it if it had been there wouldn't you?

A. Well, I expect I would have seen it, but I do not recollect as to the exact positions at all.

Q. Well, was there any there at all?

A. No, I wouldn't say.

Q. Don't you know there wasn't?

A. No sir, I wouldn't say whether there was a fence there or whether there was not.

Q. Your recollection about this entire matter is a little indistinct after these many years, isn't it?

A. Some things would be and some things would not.

Q. You are very distinct on those things which you have talked to Mr. Hunt about when you was up there yesterday——

A. (Interrupting.) No sir——

Q. (Interrupting.) But not so distinct on other matters?

A. (Interrupting.) No sir.

Q. Is that right?

A. No sir, it is not right.

Q. Didn't you talk over practically all those things with Mr. Hunt yesterday, as to what they wanted you to testify to?

A. No sir.

Q. Nor to-day?

A. No sir.

Q. Not at all. Did you know what they were going to ask you about at all?

A. No sir, I didn't know what they were going to bring out.

Q. Didn't know a thing that they wanted you to testify to, before you went on the stand?

A. No sir, not definitely.

Q. Didn't talk with anybody about it?

A. I talked to them in a general way, but nothing definitely.

Q. Now, you made the soundings up and down in front of those reservoirs, did you?

A. I made a portion of them at the upper end, at the location of the intake cribs, I think it is called, and also at the
732 location of the upper two or upper 3 cribs that are placed in position in the river.

Q. That is north of the intake?

A. Yes sir, north of the intake.

Q. Did you make any soundings below the intake?

A. I don't think I did, only just for a short distance below.

Q. The distance is about 6 feet you say, at low water, at the intake?

A. That is my present recollection of it.

Q. When it got up at about the upper crib it fell off into 15 or 20 feet?

A. There was a place that it suddenly dropped off, I remember, 15 or 20 feet deep.

Q. The balance down below the intake was about an average of 10 feet?

A. About 10 feet, that is my recollection of it.

Q. Did you ever have any experience in river protection work on the Missouri River?

A. I have never had occasion to protect river front anywhere.

Q. Never had any occasion to make that an especial study at all?

A. I have watched the U. P. dump rock into the river to protect it there at the time the river cut across the country there and made Cut Off Lake.

Q. Do you know the depth of bed rock where they tried to fill in rock?

A. No sir, I do not.

Q. The depth of bed rock would make a great deal of difference about the success of putting in loose rock for protection, wouldn't it?

A. It would make a great difference in the quantity of rock. The deeper the bed rock, the more rock it would require.

Q. It frequently happens that the bottom of the stream does not scour the bed rock, doesn't it?

A. Where the bed rock was too deep it wouldn't scour it.

Q. If bed rock was down 50 or 60 feet it would make a very great difference between that and where it was only 6 to 10 feet in protecting it, wouldn't it?

A. Yes sir.

Witness excused.

At this time by agreement of parties hereto the further taking of testimony was adjourned until Saturday, April 7, 1906, at 10 o'clock A. M.

733 Saturday, April 7, 10 o'clock A. M., parties met pursuant to adjournment, at room 429, Omaha National Bank Building, Omaha, Douglas County, Nebraska.

Present: Carl C. Wright, Esq., Solicitor for Complainants.

R. S. Hall, Esq., James M. Woolsworth, Esq., Solicitors for Defendants.

Charles W. Pearsall, Examiner in Chancery.

Further proceedings were as follows:

(See next page.)

F. H. MARSHALL is here called and duly sworn as a witness in behalf of the defendants. Being examined in chief by R. S. Hall, Esq., he testified as follows:

Q. You may state your name and your occupation?

A. F. H. Marshall. I am civil engineer for the Omaha Water Company.

Q. Where have you studied civil engineering?

A. In England.

Q. At what places have you studied?

A. In the Isle of Wight and at Oswastrey in Shropshire.

Q. Before you commenced your work as civil engineer in what schools did you study?

A. At Rugby and Bromsgrove.

Q. At any other places, at any universities?

A. Oxford.

Q. How long have you been engaged in civil engineering, Mr. Marshall?

A. About 17 years sir—18 years.

Q. How long have you been with the Omaha Water Company?

A. About 16 years.

Q. Where did you commence work for them?

A. At Florence.

Q. What were you doing?

A. Making plans of the basins showing their construction.

Q. Did you have anything to do with the work on the riprap?

A. No sir.

Q. Were you there when it was built?

A. Yes sir.

— Did you see it being built?

A. Yes sir.

Mr. WRIGHT: Is that on this side?

Mr. HALL: Yes sir.

Q. I am referring now to the riprap on this side—on the west side of the river?

A. Yes sir.

734 Q. Did you have anything to do with preparing the ground for the Water Works?

A. No sir.

Q. What condition was that ground in when you first went out there?

A. The excavation had been made for basin 1 previous to the time that I went there. They were excavating basin No. 2 and working on the riprap.

Q. You may state, Mr. Marshall, the character of that work on the riprap, the river protection?

A. From my observation in watching the work that was going on, as it was going on, it was work that required layers of stone and brush to be put together in such a manner that the brush, which is composed of willows, would be tied together by wire, in order to keep it in place, and then weighted with rock. That was taken up from bed rock, up to above high water level.

Q. Do you know the actual length of that river protection work?

A. It is about 4800 feet.

Q. How do you know that, Mr. Marshall?

A. From the notes prepared by F. Ed. King, an engineer who was working there at that time.

Q. Do you give that figure as being absolutely correct or just approximately correct?

A. Well, it is a little bit more than that. Can I explain it from this (indicating the map). That 4800 feet commences from a point zero, which is equally—which is the same point as the crib, the point of crib No. 1. The riprap extends for 300 feet north of crib No. 1. That would make it about 5100 feet.

Q. Were you there when the cutting commenced that was followed by the putting in of the riprap?

A. No sir.

Q. Did you see the slide that has been testified about, which comes so near the basins?

A. Yes sir.

Q. Did you see the way the river was coming in at the time that slide occurred?

A. I did not take any notice, no sir.

Q. In your opinion, Mr. Marshall, what would you say with reference to the necessity of that work?

Mr. WRIGHT: That is objected to as being incompetent, and for the reason that the witness is not competent to testify.

A. I should think it is absolutely necessary.

Q. Why?

Mr. WRIGHT: Objected to as being incompetent and for the reason that the witness is not competent to testify.

735 A. To hold the ground in position where the basins were constructed so high above it in altitude.

Q. How high are the basins there above the river, at the point where the slide occurred?

A. About 84 feet, sir.

Q. Where that slide occurred, Mr. Marshall, how was the bank with respect to whether it was vertical or not?

A. You mean the bank itself?

Q. Where the slide occurred, yes sir.

A. There was a "batter" on it about 2 to 1—that is a slope.

Q. If that river protection had not been put in there so as to stay, Mr. Marshall, what would have been the result?

Mr. WRIGHT: That is objected to as calling for a conclusion of the witness, and as being speculative and incompetent.

A. The chances are the whole business would have gone.

Q. It has been testified here by some witnesses, Mr. Marshall, that that river could have been stopped and that bank protected at an expenditure of about 10 dollars a foot, what have you to say to that?

Mr. WRIGHT: That is objected to as immaterial and incompetent, the witness not having shown himself competent to testify on this subject.

A. Well, sir, in my opinion I think it is sheer nonsense to suppose any such thing as 10 dollars being enough to expend in riprap protection to protect those basins.

Q. You refer to 10 dollars per front foot?

A. Yes sir.

Q. Did you see the construction going in, Mr. Marshall, while you were there?

A. Yes sir.

Q. You may just state the magnitude of it.

A. Well, the only way in which I could make a guess at the magnitude of that work was from the number of trains that were brought in there day after day, with cars full of stones.

Q. Well, just state what you saw in respect to that.

A. I should judge it would be anywhere from 10 to 15 trains of stone coming in there every day?

Q. You mean 10 or 15 trains a day?

A. Yes sir.

Mr. WOOLWORTH: For how long?

The WITNESS: It may be for a period of 7 or 8 months, I should judge from all I can remember. I do not include Sundays in that. I don't know whether they would be there Sundays or not. I was not.

Q. What would you say, as an engineer, Mr. Marshall, as to the way that work was done, whether it was badly constructed or well constructed?

Mr. WRIGHT: That is objected to as incompetent, the witness not having shown himself to be competent to testify to that.

A. I should say it was done in a very good, strong and competent way.

Q. In your opinion, from the knowledge you have of that situation, you may state whether or not that work was necessary as it was done?

Mr. WRIGHT: That is objected to as incompetent, the witness not having shown himself competent to testify to that fact.

A. I think it was necessary.

Q. Have you observed the work since it was put in; been over it and the like?

A. Yes sir, I have been over it a good many times, yes.

Q. What do you say as to whether that work is now permanent or not?

Mr. WRIGHT: That is objected to as being incompetent, the witness not having been shown to be competent to testify to this.

A. I should say it was.

Q. Have you noticed any indications of settling there in the last 5 years, to 6 or 10 years?

A. No sir, I have not, no.

Cross-examination.

By Mr. WRIGHT:

Q. Did you ever have any experience in any other river work than this, Mr. Marshall?

A. No sir.

Q. That was not a part of your duties?

A. No sir.

Q. You had nothing to do with the planning of that work, nor the carrying out of the riprap work, did you?

A. No sir.

Q. You commenced in 1890 with the Company?

A. In 1889.

Q. What time of the year?

A. In March.

Q. Then you have been with them about 17 years instead of 18?

737 A. Maybe, yes—17.

Q. You were first employed as a draughtsman, weren't you?

A. Yes sir.

Q. And during the first four or five years that was your principal business—draughting, wasn't it?

A. Yes sir, the first 2 and then I started in to doing engineering work.

Q. And during the time they were putting in this riprap your duties with the Company were that of a draughtsman?

A. Yes sir.

Q. Your statement of the number of trains is only an estimate, is it?

A. That is all, sir—from what I would see in working back and forwards all day in getting my notes.

Q. Do you know how many cars to a train?

A. No sir.

Q. You don't mean to say that there wasn't any other system of protection besides this particular system that was used, which might have protected that bank?

A. No, I don't know that I do.

Q. Don't know about that?

A. No sir.

Redirect examination.

By Mr. HALL:

Q. When you speak of system, Mr. Marshall, what do you understand by a "system" of protecting the bank?

A. Well, method.

Mr. WRIGHT: That is what I meant, that is what I had in mind.

Q. Then referring to method; is there any other method of protecting the bank on the Missouri River except by stone and brush?

A. I don't know. There may be, but I don't know sir.

Q. You have seen a good deal of river work, haven't you, Mr. Marshall?

A. Since I have been here, yes sir.

Q. What would you say as to the river work generally put in by the Government, as to whether it is permanent or not. Do you know how that is?

Mr. WRIGHT: That is objected to as incompetent, the witness not having been shown to be competent to testify to this.

A. Not of my own knowledge, no sir.

Q. Assuming, Mr. Marshall, that there was a method advocated for river work, denominated "standard" work, and that that work wherever it had been put in had gone out; what would you say as to such method as that being applied to holding these basins?

738 Mr. WRIGHT: That is objected to as being too indefinite, speculative, and calling simply for a conclusion of the witness upon a subject that is not a subject of expert testimony.

A. I think it would be wholly inadequate for a riprap that would be needed to protect the basins.

Witness excused.

At this time by agreement of parties an adjournment was taken until Wednesday, April 11, 1906.

Wednesday, April 11, 1906, parties met pursuant to adjournment, at same place, to-wit: Room 429, Omaha National Bank Building.

Present: Carl C. Wright, Esq., John L. Webster, Esq., Solicitors for complainants. R. S. Hall, Esq., Solicitor for Defendant.

Proceedings were as follows:

Captain EDWARD RUGER was called and duly sworn as a witness on the part of the defendant. Being examined in chief by R. S. Hall, Esq., he testified as follows:

Q. You may state your name?

A. Edward Ruger.

Q. What is your profession?

A. Civil and hydraulic engineer.

Q. At what places have you studied?

A. Mostly in practical work and experience.

Q. In what enterprises have you been engaged, Captain?

A. Well, I have been on a good many different works, in some 20 or 22 states, I think, I have been on hydraulic work. On questions relating to hydraulic engineering.

Q. You may state what works you have been engaged on, and in consultation on, Captain?

A. Well, I was engaged on a work in New York State, where a reservoir dam had gone out, at Owego, New York, I think it was—an impounding dam—impounding reservoir. I went down and rebuilt that. It had been built by, I think, an engineer from Boston, but I do not just recollect his name now. I rebuilt it and put it up higher than it was. I was engaged on the works here at Florence. I built the dam at Ottumwa, Iowa, across east of Turkey Island, the further side of Turkey Island. I extended the canal quite a ways down from the end that was left, that had filled up, and I put in some large waste gates down there, so I could wash the river through there and wash out the canal, the sediment that had settled there; and I planned a good many dams. I built a dam across

Rock river at a place called Indian Ford above Janesville.
739 And I built dams around the Menominee river. I planned some dams in Georgia on the Etowah river. I made some estimates of flowage on a great many streams, gauging the flow of the water at different places, measured the water used by mills and factories and vented by water wheels at different places. I made and planned the pipe system and works at Fort Worth, Texas.

Q. How long have you been engaged in business as a civil engineer, Captain?

A. Over fifty years. Largely hydraulic engineering, since '74 I think it was.

Q. Before that time?

A. Well, then, I was a civil engineer and did some hydraulic engineering, questions of flowage and that class of work, I think.

Q. What part did you take in the construction of the river protection work here at Florence?

A. Of chief engineer.

Q. When did you first come there, Captain?

A. I think it was in September first, 1888. That is my recollection.

Q. When did you commence putting in the river protection work?

A. Well, I think we ordered the material in the fall of 1888, and worked at the framing, and worked through the balance of 1888 and in 1889, but I am not positive as to when we commenced putting in the cribs absolutely. There was some timber here when I got here, and we ordered some more timber. I think in the winter of 1888 and 1889 we framed a good deal and we set the cribs that winter, some of them.

Q. How long did you continue with the work, Captain?

A. Well, I was here off and on until 1891. That is, at other places a good deal, but I was here occasionally.

Q. Then you stayed practically until the work was finished?

A. The work was finished.

Q. The work was finished some time in 1891 wasn't it?

A. I think it was finished in 1891, yes sir. I went away—I was not here after 1891. I was here back and forth from—

Q. (Interrupting.) I wish you would state in a general way the magnitude of that work and the character of it?

A. Well, when I got here the river had cut into the bank from where it was originally—as I was shown where it was originally—pretty near 100 feet I should judge, at right angles, and the works were threatened. The basement of the pump house—they had got the pump house foundation in and I think started one of the basins—had it pretty well excavated, and the river had cut in so as to endanger them. Of course there was a great variety of work to go on with reference to the water works plant.

740 Q. Just state what there was?

A. Well, they were building the basins and finishing the pump house and the river work and putting down the main. That had been partly done when I got here—leading to the city—the 36 inch main.

Q. How far had the basins gotten when you came here?

A. I think the first basin was pretty well excavated; and as I recollect it we put in the sewer trenches; and basin 2 was commenced but not very much done, not a great deal. And basins 3-4 and 5 and A and B I added. That is, on my recommendation they were added.

Q. The ground had been leveled off, of course, already, had it?

A. Well there had been some work done.

Q. Had those ravines been filled at that time?

A. Yes, there had been some filling east of basin 2, I think.

Q. Now, I wish, Captain, that you would give a general idea of this river protection work?

A. Well, the river was, as I said, cutting on this side, and the thrust of the current was over this way.

Q. What would have been the effect of that, Captain, if it had not been stopped?

Mr. WRIGHT: Objected to as immaterial, and calling merely for the conclusion of the witness.

A. Well, I was afraid that it would take the works and the basins and everything else of that kind.

Q. Well, in your opinion would it have done it?

Mr. WRIGHT: That is objected to as incompetent, irrelevant and immaterial.

A. Well, I think it would. It was cutting down here. It had cut in, as I understood, about 100 feet since 1887.

Q. Well, you saw it there and looked at it and examined it?

A. I did.

Q. From that examination, and as an engineer, what would you say would have been the effect if the river had not been stopped in its course?

Mr. WRIGHT: That is objected to as immaterial, calling for the conclusion of the witness, and incompetent, the witness not having been shown to be competent to answer the question.

A. I think it would have continued cutting in at the places it was cut in.

Q. What would have been the effect on the basins?

Mr. WRIGHT: That is objected to as immaterial, and calling merely for the conclusion of the witness, and as incompetent,
741 the witness not having been shown to be competent to answer the question.

A. Well, of course, if it had cut in and undermined them they would have gone out.

Q. Now, if you will, state what you did Captain, when you came there?

A. We took some soundings there to see about where the bed of the stream was, and where the rock under the ordinary bed was.

Q. (Handing the witness a map, marked Exhibit 14). I will ask you whether this correctly represents this riprap and the soundings and the positions of the basins?

A. I should say it does, I think the soundings here were along about where the edge of the riprap is. That is, the edge of the riprap. I think the soundings were taken along about there. I had the soundings taken after I came here, and the riprapping was done under my direction.

Q. Was the retaining wall that was built there, built under your direction?

A. Afterwards?

Q. Yes, afterwards, I mean?

A. Yes, along here (Indicating on the map). That was after we had had trouble.

Mr. HALL: I now offer in evidence the map marked Exhibit 14.

Mr. WRIGHT: No objection to that.

Q. These stations (Indicating on the map) are about 50 feet apart, I believe, are they not?

A. Yes sir.

Q. What is the height of the crib built there, do you know? The top of the cribs?

A. I think it is 32.16 Omaha datum. That is what I recollect—the figures are given on there I think (Refers to memoranda). Yes Omaha datum. It is on another map. I think I have another map where it is given. Another blue print. (Takes a blue print from his pocket and refers to it).

Q. What is that blue print?

A. Well, here it shows that the height of the tops of the cribs was 32.16. They are all the same height, as I understand it.

Q. Do you know that to be a correct map? (Referring to the map that the witness has taken from his pocket and is consulting).

A. This is a copy of the tracing that is in the office. (The map referred to is at this time marked Exhibit 15.)

Q. Well do you know it to be correct?

A. Yes sir.

Q. What is the difference between what this exhibit 15 shows and what is shown by exhibit 14?

742 A. This is a different scale. The horizontal and the vertical scale here are the same, but on there (Exhibit 14) the vertical scale is very much larger you see.

Mr. HALL: Oh, yes, the vertical scale is 20 feet to the inch and the horizontal is 200 feet to the inch.

Mr. HALL: Well, I will offer in evidence that map marked Exhibit 15.

Received without objection.

The WITNESS: I did not take those levels myself. They were taken for me.

Q. Now, you may state what you did with reference to the river protection work, Captain, just go into it and show just what you did there.

A. I sunk the up stream crib first. We framed that—I think the timbers on the front side—the river side, the water side—were 10 x 10, and on the back side 8 x 8, and there were cross timbers connecting between the front and the rear, and they were staggered back and forth so as to get the weight. We sunk those down to where there was a bed—and where there was a bed, an overlying bed, of earth or gravel or sand over the bed rock we ran a six inch pipe along up to the shore line and put water under pressure. We had a gas-pipe that ran down with a flexible nozzle and connected that with this 6 inch and put water under pressure of 150 pounds to the square inch and washed out this that was over the bed rock. We sunk the cribs down—intended to get them to bed rock, which we did. The

work consisted of bundles of willows, of willows tied in by wire, and the different bundles were tied together by and put in one above the other with the butts out toward the and some of them crossed. We tied those together—the different bundles—the different layers, with wire, and then when we built up a ways we would sink them, put enough rock on to them down near to the surface, and so built them up as far as would sink. It wasn't all washed out under the willow mat—or the riprapping, but at the river side, outside. I think it down to the rock—must have nearly. We put on that weight as it would sink, we kept putting on weight. In that way were brought up as high as they are now.

About what amount of stone did you put in there?

Well, I can't tell. I didn't keep any record of it, but we put very large amount of stone.

Well, give some idea of how it was brought in there how many men you employed and the general character of the work?

A. Well, we had perhaps from 300 to 400 men on the work altogether. The stone was brought in there by the train. The willows were brought in by the train load, and we also willows on the Iowa side and boated them across. There was an use amount of stone put in there. Had to be. I put in the so as to prevent the cutting in the river—and the crib also. ke weight as against the basins, on account of the basins cap- it so, and on account of the water coming from the hills; so strengthen the banks and hold the basins secure.

What have you to say, as an engineer, what was the necessity the construction which you used?

I think it was necessary.

Speaking in the light of the facts as you now know them, have you to say?

Yes, and as I had experience here.

Speaking of this work in the light of the facts as you now them, what would you say?

I think it was necessary, that river work.

What would you say in view of your experience now, if you he work to do over again, would you or would you not change

WRIGHT: That is objected to as being wholly immaterial.

I don't think I should lighten it up if I had it to do now, with knowledge I have. It was a mighty difficult problem we had—that river cutting in there. The Missouri River is a pretty river to control when it is thrust in on you, and the basins there to be filled with water, carrying about 35 feet, two of , and the others about 28 feet, except the smaller basins, and I they kept about 16 feet depth of water. The drainage of the was toward the river evidently.

Were you there when that slide occurred there, Captain, that up so near the basin?

I was not. I was in Denver when the last slide occurred along

by basin 3. I think we had some trouble between basins 1 and 2, and I think that was in November, 1888, but the other was in—I think it was in—I think the trouble we had between the basins was in November 1888, but when we had the slide opposite basin three was in December, 1889. That is by recollection about it. After that we put in that retaining wall along the foot of the bank.

Q. The one that is there now?

A. Yes sir.

Q. During what time was that being built?

A. That was built after the slide in '89.

Q. How long did that continue, do you remember.

744 A. Well, that winter—the winter of 1889 and '90—'88 was the first trouble between the 2 basins—November, 1888.

Q. After you put this work in, Captain, did it stand?

A. Well, it is there now. I think they had some trouble at different times, but there has been no trouble with the riprapping that I know of. There was some trouble with the basins, but for a good many years there has been no trouble that I know of. I haven't heard of it anyway.

Q. Speaking of this river protection work——

A. (Interrupting.) I don't know that they ever had any trouble since they had got started there.

Q. In other words did the work accomplish its purpose or not, that is what I am getting at?

A. Well, I should say it did.

Q. It has been testified here, Captain, by one or two witnesses that work could have been put in there for river protection at an expense of about ten dollars a running foot, which would have accomplished this purpose. What have you to say about that?

A. Well, I should say it would hardly have commenced the work of accomplishing that purpose.

Q. What would you say about work being put in there with mattress and stone, which would be limited to ten dollars a running foot? What would become of it, in your opinion?

A. I think it would go out. I never would dare risk it myself. I wouldn't dare now, with what I know about the river, put in work with less strength than there is in there. As to the quantity of material that went in there, and the cost of it, that was kept at the office. I didn't keep it.

Q. I wish however, you would give the Court an idea of how long the train loads of rock kept coming in there, and how much willows you used, in a general way?

A. Oh, well, there was an immense amount. I got all I could of willows on the opposite side by going across with a wire cable ferry. Then I had a wheel sent up from St. Louis, and made a sort of a stern wheeler, and went up the river and got them, and we had them coming in by train also, and we had train load after train load of stone coming in there for a very long time.

Q. Have you seen the work in the last two years, Captain?

A. Yes sir, I have, when I was out here before.

Q. What would you say as to whether that river protection was standing and had ceased to settle?

A. I should say that it was standing all right, and was performing its work. I don't think it had settled any for a long while, but I haven't been here continuously.

Q. So far as you could judge it hadn't.

745 A. Yes, so far as I could judge, I would say it was permanent.

Cross-examination.

By Mr. C. C. WRIGHT:

Q. If you had built that riprap out 100 feet further in the river, it would still have stood, wouldn't it?

A. Yes sir, but I didn't consider it necessary to build it a hundred feet further out.

Q. But it would have stood, and would have been firm, just as well?

A. Might. Might have narrowed up the throat of the river so much that the current going past would have been more rapid, and might have done an injury in that way. It wouldn't do to build it clear across the river and cut off the thread of the current.

Q. Who was in charge and kept the accounts so as to know the number of carloads of material that went in there?

A. The accounts were kept in the office.

Q. Who was in charge of the office at that time?

A. I think Mr. Hall and Mr. Hunt were here.

Q. Wasn't Solon L. Wiley here?

A. No sir, he went away when I came here. I came here and took his place. I was up at Soo Ste. Marie and was telegraphed to come here.

Q. A part of the timbers for this riprap were on hand at that time?

A. Yes, sir, a small part.

Q. They had already planned that before you came?

A. Not to anything like the extent that I put it in. They had some timbers there.

Q. You are responsible for the extent of that work?

A. I recommended it and put it in.

Q. It was on your advice that it was put in?

A. It was on the necessity of the occasion.

Q. It was on your advice, wasn't it?

A. I planned the work, yes sir.

Q. Now, you had taken the measurements and soundings of the river before you commenced the work, did you?

A. Yes sir, we took the soundings. My assistant engineer took the soundings, along about on the outer edge of the riprapping.

Q. Are the soundings shown upon that exhibit 14 the soundings of the bed rock?

A. Yes. On this one. (Indicating Exhibit 14) The bed.

Q. That is exhibit 14?

A. Yes sir.

Q. That is the bed rock, is it?

A. That is the bed and the bed rock.

Q. Is there any difference between bed and bed rock?

746 A. Yes sir. They are shown here on this profile. This (indicating) where that breaks down so low, is bed rock. This (indicating) is the bed. You see there is a line there called "bed" and the other is called "bed rock".

Q. Now you say the riprap has gone down to the bed of the stream, do you?

A. On the outer side, I think it did.

Q. On the outer side?

A. Yes, it kept sinking.

Q. That is out at the edge of the riprap next to the current of the river it would wash away under that and let the end of it drop over?

A. Well, what stuff there was in there—what there was under there, it would have tendency to make it go out, squash it out from under. I wouldn't state that I have sounded along under that, to be absolutely certain, but that is my recollection of it, that it went down.

Q. Down to what?

A. Down to the bed rock. That is the mattress out at the edge.

Q. Do you mean to say that in those places where there is a difference between "bed" and "bed rock" that the mattress went clear down to bed rock there?

A. I don't know what it would rest on, unless it did go down to bed rock so as to be permanent.

Q. What was the character of the bed where you did not strike the bed rock, the character of the soil or material?

A. Well, it was such that we could push through it so as to get to bed rock. We had an iron rod and we pushed the rod down through it.

Q. You could push through it with an iron rod?

A. Yes sir.

Q. Was it sand or gumbo?

A. I think it was sand, but I don't know now, I can't state positively.

Q. And you never did sound since that time to know whether it scours the bed rock, did you?

A. I have never sounded since, no sir.

Q. Did you find opposite station 10, I think it is marked on Exhibit 14, that the riprap went down any further than it did under the other places along here?

A. I have not sounded it since.

Q. Well, you do not remember when you put it in that it went down any such great amount more?

A. I think it went down in some places deeper than the other.

Q. Do you recollect that it did at that place?

A. That is my recollection, as far as I know about it now.

747 Q. You don't recollect anything about it now, do you?

A. Well, I did not take the soundings and I don't remember about it.

Q. The bed rock was comparatively shallow at that place, for the Missouri River, wasn't it?

A. I think the bed rock was nearer the surface there generally than at other places above and below.

Q. You never had any experience in the protection of the Missouri River at any other place, did you?

A. No sir.

Q. You said that it was a very hard river to protect, how do you know that?

A. By its reputation. I heard of it. People came to me when I was here and I inquired very much about it of the old settlers, and everybody told me it would be very difficult to do and that probably I would have everything washed down the river—that it had been done before. That was the reputation of the river.

Q. Is it any harder to protect the Missouri River where you can reach bed rock in from $7\frac{1}{2}$ to 30 feet—is it any harder than other rivers in that respect?

A. The larger the volume of water and the swifter the current the more of a test it will be.

Q. It will stand on the Missouri River when it is down to bed rock the same as it will on any other river won't it?

A. It seems to have stood here.

Q. You don't know any other place where they had trouble on the Missouri River where bed rock was as near or anything like as near as it was at that place, do you?

A. I do not—the general bed rock of the Missouri River.

Q. Are you familiar with the character of the river protection in front of St. Louis on the river there?

A. I have not examined it at all. I am not familiar.

Q. It would be perfectly feasible to build a solid crib of rock clear along the face of that work where bed rock is at this shallow distance, wouldn't it?

A. I should want to examine the place where it was to be built before I would give an opinion about that.

Q. You would not say that it would not be practicable to protect that by building a solid crib of rock longitudinally with the stream and filling it in back of it would you?

A. Well, that would depend upon the thrust of the stream, and the current, and the depth of the water and what the rock rested upon.

Q. I am assuming bed rock like this was?

A. Well, if you put in a heavy enough wall—or crib work there that was heavy enough—weighed enough—had enough weight to it, it probably would answer the purpose.

748 Q. You completed your riprap at what time?

A. I think that was completed in '90, pretty well, but there was more or less work on it, I think, up until '91, in '91 some time.

Q. Wasn't it substantially completed in the fall of '89 except some few additions?

A. I hardly think so.

Q. You don't remember now, do you?

A. No, I don't think it was. That would be my recollection, that it was not.

Q. Well, you had put in a riprap in front of the——

A. (Interrupting.) We had the slide there in '89.

Q. That was after you had put in the riprap in front?

A. We had put in a good deal of riprap and then added to it.

Q. Then your riprapping in front did not prevent the slide?

A. It prevented it from going into the stream. I think if the riprapping had not been there the whole thing would have gone. It ran down and met that and then sloughed over. It came like a wave and then sloughed right over on top of it and it held it there.

Q. Did you ever notice any other place in this vicinity where the soil had sloughed on the steep banks?

A. Why it is all along the Missouri River where the banks have sloughed.

Q. Did you ever notice a situation where it sloughed and how it acted?

A. I have seen it above here, above Omaha there, where it cut in and——

Q. (Interrupting.) I don't mean simply where it is cutting, but I mean when it is thawing out in the spring and times of that kind, when the steep banks slough?

A. I have not examined it along here with reference to that.

Q. Don't you know that in sloughing of that kind that it always runs out over, that the volume carries it right out over the soil at the base of the slough?

A. Whatever sloughs off would probably make the way of the descent wherever the descent was.

Q. The retaining wall was put in there to prevent this, to prevent these repeated sloughings, wasn't it?

A. To make more weight there to protect the basins and make the works more secure.

Q. It was to protect them—to protect these repeated sloughings, wasn't it?

749 A. Well, there was two of the sloughs. One was in '89 and that was owing to the work that was put in there. There was a brick sewer going down between basins 1 and 2, and I had put an iron pipe in there, and the break I speak of was from one end of basin 2. The water found its way through there and then went down through this iron pipe into the river. The other was opposite basin 3, due to water getting in there between that basin and the bank.

Q. The first was due to some break in the construction of the reservoirs?

A. From one basin to another. Basin 1 to basin 2, I think. That was in 1888, I think.

Q. The second one opposite basin 3 was due to the sloughing of the bank due to the impregnation of water?

A. I think it was due to water.

Q. Now then this retaining wall was put in there to prevent a recurrence of that?

A. To make more weight there.

Q. Wasn't it for the purpose of preventing a recurrence of the sloughing of that kind?

Mr. HALL: That is objected to as having been asked and answered a half a dozen times.

Mr. WRIGHT: He hasn't answered it yet.

Mr. HALL: Well, he doesn't have to answer it yes or no. If I was in Court I could stop you.

A. It was to render and give greater security to the basins and to the bank.

Q. Was it put in for any other purpose than preventing a recurrence of sloughing of that kind?

Mr. HALL: That is objected to because the witness has stated two or three times, and has stated two or three different purposes that it was put in for a half a dozen times.

A. I don't know that I could state anything different than what I have.

Q. You had no thought of putting in that retaining wall though prior to the sloughing near reservoir No. 3, had you?

A. No, I don't think I had. That showed me more of the under-workings there and I tried to render the works more safe and secure.

Q. That sloughing occurred after the construction of reservoir No. 3, didn't it?

A. Yes sir.

Q. And there was a break in reservoir No. 3, a crack in the walls of it, was there not?

A. Not in the walls. There were several cracks in the bottom where the cement had cracked.

750 Q. And you thought that it was the water getting out through that that caused this sloughing?

A. Well, I couldn't determine that—whether it was that, or whether it was the water that came down from the hills. There was a body of water there on the hill side of the basins, and whether it came from that and seeped down or whether it came from the basins I couldn't determine in my own mind satisfactorily. I tested to find out.

Q. Of course you could relieve that volume of water from the west of the reservoirs by putting a pipe through there, couldn't you?

A. There was a pipe put there.

Q. It didn't drain the water away did it?

A. That was the object of putting it in. There was a wooden drain put in before I got there and put in one of cast iron.

Q. But still there is a good deal of water banked up against the west side of the reservoirs?

A. Yes, there is a good deal of water there.

Q. Then that drain is out of order?

A. No, sir, I don't think it is.

Q. Why don't it take the water away then?

A. Well, it comes down faster than it will take it away, I believe.

Q. Well, it stands there now, don't it, and stands there all the time?

A. I don't know whether it does or not.

Q. Didn't you examine it the last time we took your testimony?

A. I don't recollect that I examined that drain.

Q. Didn't you go along the west side of the reservoirs?

A. I think I did, but I don't think I went to examine that drain.

Q. Didn't you observe a pond of water standing west of the reservoirs?

A. I have observed at times a pond of water, but I have not observed it recently.

Q. You did not observe it at the time you were here?

A. I don't know whether I did or not. I can't tell you now.

Q. Do you know the difference between datum at Florence and datum at Omaha?

A. Well, I understand that the levels here (Indicating on the map) are with reference to the levels—with reference to the datum at Omaha. All of the levels given on the prints.

Q. But what is the difference between the datum at Florence and datum at Omaha?

Mr. HALL: Objected to as assuming that there is a datum at Florence.

751 A. Well, the levels at Florence refer to datum at Omaha.

Q. You give the height of the crib as 32.16 above city datum at Omaha?

A. Yes sir.

Q. How much would it be above datum at Florence?

A. Well now perhaps you and I don't understand each other. For instance we take this as the elevation that we should make our datum and we call that 0 0 0 or we might call it 50, it is an assumed height. Take that as 0-0-0 and you go on to ground lower than that with your level and that would be a minus quantity, but if you go above it it would be a plus quantity. For instance you go 50 feet above, and it would be 50, you make a bench there, that would make the height of that bench, and you would call it 50, and that would refer to your datum here—that would be zero (Indicating).

Q. I understand that perfectly, but you have said that the top of the cribs that you put in were some 32 feet above the datum at Omaha. Now I want to find out how much the top of those cribs would be above the datum at Florence, or above low water mark at Florence?

A. I don't know any other datum at Florence other than the benches. That refers to the datum at Omaha. These benches at Florence refer to the datum at Omaha. We have lots of benches on works. We have a bench that may be 20 feet above, and another one convenient to work that may be 40 feet above datum. According to the height of the ground. All along a railroad you have benches. One may be a hundred feet and another may be 30 feet. They refer to the initial datum.

Q. I want to know what is the height of this crib above low water at Florence, do you know what it is?

A. No, I have it above Omaha datum.

Q. And you can't tell what it is above low water at Florence?

A. I think I can tell what it was above the high water mark of '81 here.

Q. I want to know the low water mark.

A. I think it would show on this profile here, these soundings.

Q. When were they taken?

A. In '88 and '89.

Q. Is that line (indicating) given there as low water line?

A. The water line at the time the soundings were taken.

Q. There is a very great difference in that at different times of the year isn't there?

A. Oh, yes. The water line in 1881 here was up to 30.

752 Q. I understand it, but what I want to get at so that we may understand it is—when you give the distances below the water line, what water line you refer to?

A. The water line at the time I took the soundings.

Q. Can you tell how that line compared with the low water line at Florence?

A. You have it on the 2. You have the top of the cribs with reference to datum at Omaha and you have the depth of the soundings with reference to that. That is all plotted out here.

Q. But that won't give you the distance of the water line as shown on these maps?

A. The water line would vary almost every day and hour.

Q. So that the distance below water of the bed rock would at the time you made the soundings?

A. Yes, sir, that is what that water line there is.

Q. So that the distance below water of the bed rock would vary and is not shown below low water mark on these soundings?

A. Oh, there are not all the variations of high and low water shown on that. It is the water line at the time the soundings were taken.

Q. And it does not pretend to represent the low water line at Florence?

A. Well I think so. I think it was pretty low water at the time because it was in the time of the year that I got here, and it was before any high water came. It was at low time, but I don't know whether it was what you would call very low water or not. To get low water at a place you might have to take it for several years you know.

Q. After you put in the first 2 cribs—they were at the north end of this river protection weren't they?

A. I put in first the upper crib and then the next one down—followed down.

Q. The two north ones were put in first, before the others?

A. Before the others, that is my recollection about it.

Q. You did not have any cutting did you after you put those in, on the bank?

A. That turned the water away some. We had an ice gorge at Sioux City when I put in the double crib and when the ice came down it stove in some of the double crib put in to protect the intake pipes. I hadn't filled it in.

Q. But you didn't have any cutting on the banks?

A. We protected it by this double crib, but the ice came down and knocked some of our timbers off of the corner.

Q. But below that there was no cutting in on the banks after you got that double crib in?

753 A. I don't think there was, but I put in the cribs so as to secure the whole length of the basins.

Mr. WRIGHT: I move to strike out all the answer of the witness to the last question, after "I don't think there was," for the reason that it is not responsive to the question.

Q. Capain Ruger, you never took any regular course in engineering, in hydraulic engineering?

A. Nothing, but I have studied it and practiced it all my life almost.

Q. You commenced your practice of civil engineering in the army, didn't you?

A. No sir, I did not. I worked at civil engineering long before I went into the army.

Q. How long?

A. Well, from—I did work in '58, '59 and '60, before the war—practicing civil engineering.

Q. How old a man are you?

A. I was 71 last September.

Q. And you had been then a civil engineer in '58, '59 and '60 before the war broke out?

A. Yes sir I had been—

Q. What did you do—

Mr. HALL: Now let him answer the last question.

A. (Continued.) I was on railroad work and on city engineering work—and I was on some—before I went in the army I was on some hydraulic work.

Q. What?

A. With reference to flowage matters, that is, estimating the amount of flowage, taking the measurement of streams and so forth.

Q. But on no construction work prior to entering the army, were you?

A. I think not until after entering the army. I went down and made a report for General Rosecrans, on the Cumberland River, I recollect.

Q. That was during the war?

A. Yes sir.

Q. You were an engineer during the entire period of the war?

A. I was at General Thomas' headquarters—in the first place at Rosseau's, and then afterwards—I was with Rosseau until the Atlanta Campaign. During the Atlanta campaign I was ordered from General Rosseau's headquarters to General Thomas' head-
754 quarters. I was afterwards topographical engineer of the army of the Cumberland and superintendent of the office and of the field work for about 6 years. I was at his headquarters.

Q. What was the first constructive hydraulic engineering that you ever undertook?

A. Well, I should say in 1874 I commenced that kind of work, constructing work?

Q. Where?

A. I think I constructed—I rebuilt a dam there at Owego—I don't know as it was '74—it might have been after that—on the Rock River—this dam that I spoke of—that was in '80 at Owego, New York. I planned a reservoir at Abalon, Wisconsin.

Q. I mean construction work?

A. Well, that was construction work.

Q. Were you in charge of the construction?

A. Yes sir. I planned a reservoir at Fort Worth, and I did work at Cheyenne, Wyoming, out here. That was about the time I was here, I went out and planned that, and I planned a reservoir—I think I built dams there. I built dams in Georgia—planned a dam across the Etowah river and I planned dams across the Menominee river in Wisconsin.

Q. Were you in charge of the construction of those dams in the places where you say you planned them?

A. Not all of them, no sir.

Q. This work at Omaha was the first river protection work you had even undertaken was it?

A. No, I had been on the Des Moines river and built dams there.

Q. Well, I mean river protection work—protection of the bank against encroachment of the river.

[A.] We did some river protection work there too.

Q. Where was that?

A. At Ottumwa.

Q. Was that after you were at Omaha—or before?

A. Yes, sir, before.

Q. When?

A. I think I was out there in '78. The dam had gone out three times, as I understood it, on the far side of Turkey Island, and I went there to rebuild it.

Q. You think that was in '78?

A. I think it was in '78 I went there.

Q. And this was, as I understand it, the first work that you ever had on the Missouri River, and the only work you ever had on the Missouri River?

A. Yes sir, I think this was the first work I ever had on the Missouri River. It is about the only work that ever stood on the Missouri River too, that I have heard of.

755 Mr. WRIGHT: I move to strike out the last sentence of the answer as being voluntary, not responsive, and for the further reason that it is immaterial.

Redirect examination.

By Mr. HALL:

Q. Captain, that dam that had gone out three times at Turkey Island, that you spoke about—when you put your dam in did it stay?

A. It is there today. After it had been in about 25 years they were in trouble with the city, and they wouldn't put any money into it, and the planking on the deck of it was in bad shape, but that was owing to neglect. I understood when I went there that they had spend \$90,000.00 on that work—when I went there.

Mr. WRIGHT: I move to strike out all the last answer of the witness after the words "It is there today", as being voluntary testimony, not responsive to the question, and as being wholly immaterial and irrelevant, and hearsay.

Q. Who told you they had spent \$90,000.00?

Mr. WRIGHT: That is objected to as being immaterial, irrelevant, incompetent and calling for hearsay testimony.

A. That is what I heard commonly talked—the dam had gone out three times before I went there.

Mr. WRIGHT: We move to strike out the answer of the witness as being wholly incompetent, being a statement of hearsay entirely.

Q. There wasn't any dam there when you went there, was there?

A. There were just little ends. I had to put in a coffer dam and everything. I had to extend the canal down a quarter of a mile and put in waste gates to wash it out. Then I had to rebuild the guard lock and there and had to put in waste gates there to wash it out thoroughly.

Q. Now, Captain, didn't you do some work at Little Sioux?

A. Little Sioux?

Q. Yes, or at Soo Ste. Marie?

A. I was up there at Soo Ste. Marie on some work.

Q. I thought you had forgotten that.

A. I was up there for a company, but they didn't have enough work to carry out the work that was planned and they afterwards sold it out. I made some plans and surveys with reference to the big water power canal there at Soo Ste. Marie. I was up there when I was telegraphed to come here as quick as I could, and that was in the fall of '88. I was up there at Soo Ste. Marie and got my telegram there. I built the impounding dam—the impounding reservoir at Owega, New York, and another reservoir—what they called the distributing reservoir.

Q. Captain, you may state in what respect and why you considered this work absolutely necessary in the way you put it in?

Mr. WRIGHT: That is objected to as absolutely incompetent. We are not questioning his good faith.

A. Well, in the first place the water supply came from up there for the City of Omaha—was planned to come from there—the 36 inch main all along past there was laid when I got here—was being laid. The reservoirs there to supply this city stood over the river. There had been quite an extensive expense made there, and if that work had not been made secure it would have left the city of Omaha without water and it would have involved a great loss to the Company. Now I considered that carefully and thoroughly and sin-

cerely too, and I don't believe you can find an engineer in a hundred—I don't know that you can in a thousand—that was responsible for that work, to protect that work and to bring your water to Omaha, that would have gone and put in any cheap work like that which has been mentioned here. It is the irresponsible man that don't stand under things that can talk about cheap work, but the man that stands under it and is responsible, that is the one that wants to make it sure.

Mr. WRIGHT: I move to strike out all the witness's answer beginning with "I don't believe you can find an engineer in a hundred," as being entirely irrelevant and immaterial, and incompetent, being a statement of the mere opinion of the witness, and not being responsive to the question.

Recross-examination.

By Mr. WRIGHT:

Q. What had been the extent of the expenditures on their work at the time you came here?

A. They had basin No. 1—

Q. (Interrupting.) Well, I mean the amount in money.

A. I don't know.

Q. Well, fifty or seventy-five thousand?

A. I don't know anything about the expense, that was kept at the office.

Q. You did not stop to think about how much they had already put in there?

A. I questioned whether I could go back of that. I was told that they couldn't give me any time at all—that that work must stand.

Q. So you were not there planning the whole work?

A. I took it as it was.

757 Q. You came there as it was cutting in and you went right at it to stop it as it was?

A. I came there and found all this property back of it supplying the City of Omaha, and I had to step in the breach there and I did the best I could.

Q. The principal thing you were looking out for was to stop it without regard to expense?

A. It was to stop it, but it was not without regard to expense. An engineer never does anything without regard to expense, that I know of.

Witness excused.

At this time by agreement of parties, an adjournment was taken until Tuesday April 17, 1906, at 11 o'clock A. M.

Omaha, Nebraska, April 17, 11 o'clock A. M. Parties met pursuant to agreement and adjournment.

Present: Carl C. Wright, Esq., Solicitor for Complainants, R. S. Hall Esq., Solicitor for defendants, Charles W. Pearsall, Examiner. Further proceedings were as follows:

E. M. FAIRFIELD, a witness heretofore called, sworn and examined, as hereinbefore set forth, on the part of the defendants, was at this time recalled for further examination on the part of the defendants, and upon being examined by Mr. R. S. Hall, testified as follows:

Q. Mr. Fairfield, you were present during the giving of the testimony in the appraisement case?

A. Yes sir—you mean before the appraisers?

Q. Yes.

A. Yes.

Q. Were you there when the books of the company were offered to the appraisers?

A. Yes sir.

Q. You do not remember the exact language of the offer I presume?

A. No, I wouldn't be able to quote the language.

Q. Could you quote it by referring to the evidence as published—as written out by the stenographers?

A. Yes sir.

Q. Mr. Fairfield, looking on page 125 of the report of the evidence taken before the appraisers, volume 4, I find this language:

"Mr. HALL: Now for the Water Company we desire to say that all the books and vouchers and other papers of the Water Company are open for examination by the appraisers, for the exclusive and confidential information, for the sole purpose of this appraisal, and are offered by the Water Company for that purpose."

Was that the language under which that offer was made?

758 A. I remember the offer. Of course my recollection would not go as far as the exact language that was used, but I remember the offer made in that form.

Q. Were the books of the Company afterwards delivered to the appraisers, Mr. Fairchild?

A. Yes sir. I may say further that the day after that hearing closed, namely, on the 31 day of December, 1904, the hearing having been completed the day before, the appraisers came into our office, and we at that time tendered the books and were shown a few of them in a general way. They didn't stop to examine them carefully but looked into them for a few minutes, and got the style of our book keeping.

Q. Was the city appraiser there—Mr. Alvord?

A. Yes, they were all three there.

Q. When were the books and papers and vouchers of the Water Company delivered to them?

A. Never delivered any vouchers to them—never asked for them, the books were delivered in February of this year.

Q. Did you deliver whatever they asked for?

A. Yes, sir, books covering a period of about 10 years, I think—10 or 12.

Q. Well, whatever books you did deliver were the books they called for?

A. Yes sir.

Q. The entire books were subject to their order? They could have had anything they wanted?

A. Yes sir.

Q. I call your attention, Mr. Fairfield to the language used in Mr. Woodbury's affidavit concerning the statement made by Governor Boyd of the Water Board—have you looked at Mr. Woodbury's affidavit?

A. Yes sir.

Q. I call your attention to the statement made in Mr. Woodbury's affidavit, that Governor Boyd had stated that the city desired to purchase the entire works. Did you hear Governor Boyd make that statement?

A. I did.

Q. Where did he make it?

A. At the hearing before the appraisers. I don't remember just what day, but it was——

Q. (Interrupting.) When both sides were represented?

A. Yes sir.

Q. I call your attention to a volume to which I call your attention and ask you what that is?

A. It is the printed proceedings before the appraisers in the matter of the appraisement of the water plant, and the exhibits offered. I believe, up to a certain point in the appraisement.

Q. Up to a certain point in the appraisement?

A. Yes, up to the point shown therein.

Q. I call your attention to page 29 of that volume, and I read you this in the record (Reading):

759 "Mr. BOYD: Can you value this property separately? That is the question for you to decide. The city, I believe, wants to buy the entire works."

Was that the language used by Governor Boyd at that time?

A. Yes, sir, I remember that.

Mr. HALL: I now offer in evidence so much of the record contained on page 29 of the printed volume referred to and identified by the witness, as is contained in the language of Governor Boyd as set forth therein. That portion of the page offered as above is marked Exhibit 16, and is as follows:

"Mr. BOYD: Can you value this property separately? That is the question for you to decide. The city, I believe, wants to buy the entire works. I believe that is the opinion of nine-tenths of this city; but as a question in law can they buy it? In order to know that it will have to go through the courts, in my judgment. Now we want this water works property appraised separately. We want the pumping station separate. We want everything separate so far as possible, and certainly we want the property in these outside towns separate, so we would know what there is. Otherwise, when we come to bond the city for the purchase of this water works some person will get out an injunction restraining us from buying the property in South Omaha and the other towns. Then the question will go into the courts and the courts will decide what we should do. Then, if we can have this property separate we have an appraisal that will show just what

there is. We want to purchase the entire property if we possibly can do it. We expect to do it."

Mr. WRIGHT: That is objected to as being incompetent and immaterial.

Cross-examination.

By Mr. WRIGHT:

Q. Mr. Fairfield, at the time of the statement of Mr. Hall that you have referred to, in reference to the production of the books, an objection was made by the city's representative unless the city's representative should have a chance to examine the books, was there not?

A. I think so, yes sir.

Q. And every time, whenever you have known of any offer of the books of the appraisers, there was an objection on behalf of the city by the city's representative, unless he should be given a chance to examine and inspect the books thoroughly?

A. I think so. I don't remember anything in connection with the offer of the books except that which was made at or near the close of the proceedings. Objection was raised at that time by the city unless their representative should be present, to which answer 760 was made that the appraiser appointed by the city would be present, if I remember correctly.

Q. But that the attorney for the city, representing the city, should not have any chance to examine it—the books—nor any expert for the city?

Mr. HALL: I object to that unless the witness remembers what the objection and the language used, was.

Q. Don't you remember that during the course of that hearing it was suggested by the city's representative that we would appoint somebody to examine the books on our part?

A. I remember some discussion of that kind. There were two or three alternative propositions, as I recall it.

Q. You remember that at the start we offered to select one man to work with a man appointed by the Water Company to examine the books, and make the drawings and plats, do you not?

A. You mean for the purpose of the inventory?

Q. Yes?

A. Yes, I believe so.

Q. And we offered also to allow the Board to appoint some man subject to their control?

A. Yes.

Q. You remember at the time the books were presented—you presented them at Cincinnati since the commencement of this suit in which you are now testifying—you remember that that written objection was on file with the Board at that time, against proceeding with them without a chance being given the city to cross-examine the books on the part of the city?

A. Yes sir.

Q. So that while you made the offer as stated in the language here, you understood at all times that that was against the objection and protest of the city, unless the city could have a chance to examine and cross-examine as to the books?

A. Oh, I supposed that objection of the city was continuous, of course. The appraisers did appoint their own expert to examine them.

Q. That is after the Cincinnati meeting they appointed somebody to audit the books?

A. Yes sir.

Q. You never did submit the books and give the city a chance through its attorney, or man selected for that purpose, to examine and cross-examine the books, did you?

A. No sir.

Q. But you, on behalf of the Company, have always refused to do that?

Mr. HALL: I object to that.

A. I don't think it ever came up to me.

761 Q. Now, Governor Boyd's statement, to which your attention has been called, was made in the preliminary discussion as to how the appraisers should proceed, wasn't it?

A. Yes, I believe so. I believe it was made in the early proceedings.

Q. That was made on or about the 20th day of July, 1903, the first meeting?

A. Somewhere in July I believe it was.

Q. And that meeting is shown by the record—or at that meeting, as shown by the record, C. C. Wright was the accredited representative of the city?

A. Yes sir.

Q. And that was made—that statement of Governor Boyd's was made during a general discussion in which the city, through its attorney, Mr. Wright, had demanded a separate appraisalment for the South Omaha and Omaha property?

A. That is the way I remember it, yes sir.

Q. And these remarks that have been quoted were interjected by Mr. Boyd into that discussion or during that discussion?

Mr. HALL: I object to that as calling for a conclusion of the witness. Mr. Boyd was chairman of the Water Board and had as much right to speak as anybody else, and fully represented the Water Board as much as anybody.

Mr. WRIGHT: Well, that don't apply to this question now. Just answer it, anyway.

A. Well, I don't understand that it was an interjection any more than the remarks of any one else on the subject.

Q. It was a part of the discussion—a statement by him?

A. Yes, a part of the discussion.

Q. In that discussion statements were made by Mr. Congdon?

A. Yes.

Q. And Mr. Rosewater?

A. Yes.

Q. And by Mr. Woodbury?

A. Yes sir.

Q. And Mr. Hall?

A. Yes.

Q. And by the appraisers and all?

A. Yes.

Q. It was a general discussion as to what——

A. (Interrupting.) Methods——

Q. Methods, and what they should appraise?

A. Yes.

Redirect examination.

By Mr. HALL:

Q. Did Mr. Wright ever come to you and demand, as he calls it, leave to cross-examination the books of the Water Company?

A. I don't remember of any such demand.

762 Q. You were here in Omaha where he could have come and asked you to cross-examine the books, if he had desired, weren't you?

A. Yes sir.

Q. Or any other representative of the city—did any representative of the city come and ask to examine the books after this offer made to the appraisers?

A. Not of me, nor not to my knowledge.

Recross-examination.

By Mr. WRIGHT:

Q. Are you willing now to produce those books before the appraisers for a cross-examination by the City of Omaha, and the Water Board?

A. Before the Appraisers?

Q. Yes.

A. Why the appraisers have already examined them.

Q. But I mean are you willing to produce them for our examination and cross-examination before them?

A. Well, I would have to be guided by the advice of counsel on that question. As far as I am personally concerned I am.

Q. But so far as the Company is concerned you are not?

A. Without legal advice.

Q. You have never received any legal advice to produce them?

A. No.

Q. You have received legal advice not to produce them until you were compelled to?

A. Well, that is assuming a little more than has really taken place.

Q. You didn't need to have advice given you on that subject, did you?

(No answer by the witness.)

Q. That is right, isn't it, you did not need to have the advice?

A. Well, I guess that is right, yes.

Q. In that hearing before the appraisers the evidence was taken like it is in Court, the parties producing the evidence, the witnesses being examined and the testimony taken down in shorthand, and the opposite party cross-examining?

A. Why that was the method regarding the schedules of property which we offered.

Q. And also which was offered in regard to how——

Mr. HALL: That is how the witnesses were examined.

Q. All the witnesses to prove different facts were examined in that way?

A. Yes sir.

Redirect examination.

By Mr. HALL:

Q. But it was not so in regard to certain letters which Mr. Wright produced, was it?

A. It was not.

763 Recross-examination.

By Mr. WRIGHT:

Q. The letters which were produced were offered and tendered to you for cross-examination upon them, were they not? To the Water Company—offered in open court before the Board of Appraisers in open session?

A. Well, the witnesses were not there, as I remember it, in some cases.

Q. But the letters were produced?

A. The letters were produced.

Redirect examination.

By Mr. HALL:

Q. But the parties who wrote them were not there for cross-examination, were they?

A. The authors were not there.

Witness excused.

COPY OF EXHIBIT 1, C. W. P.

In the Circuit Court of the United States for the District of Nebraska.

To the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Sitting in Equity:

The City of Omaha, being a city of the metropolitan class, created and existing under and by virtue of the laws of the state of Nebraska, presents this, its amended and supplemental bill of complaint against the Farmers' Loan & Trust Company, a corporation created by and

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existing under the laws of the State of New York, and having its principal office and place of abode in the city of New York, and against the American Water Works Company a corporation created and existing under and by virtue of the laws of the State of Illinois, and a citizen of the state of Illinois, and having its principal office in the City of Chicago, in the said state of Illinois, and against Thaddeus S. Clarkson, receiver of the American Water Works Company of Illinois, a citizen of the state of Nebraska and having residence in the City of Omaha, state of Nebraska, and against Ellis L. Bierbower and Alonzo B. Hunt, receivers of the American Water Works Company, both being citizens of the State of Nebraska and residents of the city of Omaha.

Thereupon your orator complains and says:

1. Your orator is a corporation bearing the corporate name of the "The City of Omaha," duly created under the laws of 764 the state of Nebraska under and by virtue of an act entitled "An act incorporating metropolitan cities and defining, regulating and prescribing their duties, powers and government."

2. The defendant the American Water Works Company (of Illinois) is a corporation organized and existing under and by virtue of the laws of the State of Illinois for the purpose of building, equipping and operating works to supply water to cities, towns, villages and municipal and other corporations, and to acquire by purchase, lease or otherwise, such works and operate them, both in the said state of Illinois and elsewhere, and for other purposes.

3. This complainant represents that by a certain amendment to its charter approved February 27th, 1879, and appearing on page 99 of the authorized publication of the session laws of the state of Nebraska for said year, the said city of Omaha was authorized and empowered:

"To erect, construct and maintain water works either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such water works, and to do all acts necessary for the construction, completion, management, and control of the same, including the appropriation of private property for the public use in the construction and operation of such water works; * * * and the mayor and council of each city created or governed by said act, shall have power to contract with and procure individuals or incorporations to construct and maintain water works on such terms and under such regulations as may be agreed upon."

4. Your orator further says that afterwards on the 11th day of June, 1880, the city council of the city of Omaha passed an ordinance which was on the same day approved by the mayor of said city, being ordinance No. 423, entitled, "An ordinance to authorize, procure and construct a system of water works in the city of Omaha, Nebraska."

In and by said ordinance it was provided that any person, company or corporation who should construct and maintain water works of a certain magnitude and character for the purpose of supplying the City of Omaha and its citizens with water should have

the right of way in the streets, alleys and public places of said city during the time any such person or company should maintain and operate any such water works.

And the complainant avers that by the terms of said ordinance the franchise therein granted was in effect limited to the time
765 during which the party lawfully holding the same should operate said water works, and that said franchise was not assignable without the authority and consent of said city, and that the power and functions therein delegated could not be redelegated by the original grantee to a third person without the like municipal authority and consent.

In said ordinance it was also provided that advertisement should be had to the end that proposals for the construction of such water works might be made.

A copy of said ordinance is hereto attached and made a part hereof as Exhibit A.

5. And thereafter the said city of Omaha enacted a certain other ordinance known as ordinance No. 430 amendatory to the foregoing ordinance, and being entitled "An ordinance to amend sections three (3) six (6) and twelve (12) of ordinance No. 423, * * *, and being approved by the mayor of said city on the 15th day of July, 1880, of which a copy is hereunto attached and made a part hereof as Exhibit B.

6. On or about the 20th day of July, 1880, in answer to the advertisement in said ordinance provided for, one S. E. Locke submitted his written proposal for the construction of said water works wherein he expressly accepted all the conditions and specifications of said Ordinance No. 432 in case the contract for constructing said water works should be awarded to him.

7. The City of Omaha accepted the proposal of the said S. E. Locke, and under the date last aforesaid entered into a written contract with him to construct said works and for the period of twenty-five years from the completion thereof to furnish the said City of Omaha with water for fire protection and public use a copy of which said contract is hereto attached and made a part hereof as Exhibit C. And the complainant alleges that said contract was not assignable without the authority and consent of the said City of Omaha.

8. Afterwards, on the 26th day of July, 1880, the said Sidney E. Locke for a good and valuable consideration, did assign, sell, transfer and set over unto "The City Water Works Company of Omaha, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, said contract for the construction, operation, control and maintenance of water works in the city of Omaha, with all the rights, privileges, immunities, profits, duties and obligations, that he, said Sidney E. Locke, did have thereunder, to the same extent in each and every part as if said contract had been
766 made with the City Water Works Company of Omaha originally, and not with said Sidney E. Locke."

Which said assignment was made with the knowledge, consent and authority of this complainant.

9. And thereupon the said City Water Works Company did erect

and construct a system of water works, which were accepted by said city in its certain Ordinance numbered 618, approved September 1883, and thereafter maintained and operated said works for about four years.

10. And the complainant avers that the said City Water Works Company by accepting the said assignment from the said S. E. Loeb so as aforesaid made with the authority and consent of said city and by constructing and operating said works under the franchise aforesaid, made its contract with the said city to perform a public duty, viz: to furnish the said city and its inhabitants with water for fire protection, and for public use and other uses, and thereby deprived itself of the power to do or suffer anything whereby it would disable itself from the performance of said duty, without the authority and consent of said city.

11. And thereafter, on or about the first day of July, 1887, "The said City Water Works Company," did assign and transfer the franchise and contract to the said defendant, "The American Water Works Company," by its instrument in writing, a copy whereof is hereto attached and made a part hereof as Exhibit D.

12. And thereafter, on or about the 20th day of December, 1887, the said American Water Works Company communicated to the City Council of the said city of Omaha a copy of the assignment and transfer last named, and asked that the said city of Omaha consent thereto, and ratify the same; and at the date last named the said communication was referred to a committee of said council, which reported thereon as follows:

"CITY OF OMAHA, COUNCIL CHAMBER,
OMAHA, NEB., Jan. 10, 1888

Mr. PRESIDENT: Your committee, to whom was referred the assignment of the City Water Works Company of the city of Omaha and all its liabilities to the American Water Works Company (Chicago), have carefully considered the same, and recommend that the assignment be granted."

And said report and recommendation was thereupon adopted by the city council and approved by the mayor of said city, and thereupon the defendant the American Water Works Company entered upon the maintenance and operation of said water works.

13. And the complainant avers that by the acceptance of said assignment so as aforesaid authorized and consented to by said city the said American Water Works Company contracted with said city to perform a public duty, namely, to furnish the said city and its inhabitants with water for fire protection and for public and other uses and thereby deprived itself of the power to do or suffer anything whereby it would disable itself from the performance of said duty without the authority and consent of said city, and this obligation and limitation upon the power of the said American Water Works Company was well known to the defendant companies and to the holders of bonds hereinafter mentioned before they acquired an interest whatever in such bonds, or in the premises.

14. And the complainant avers that the said contract and the said franchise were not assignable, without the expressed authority and consent of the said city thereunto; and that when the said defendant, the American Water Works Company, received the transfer and assignment above set forth, it took the same subject to all the terms and conditions of the said ordinance No. 423; and more especially subject to the restriction therein contained limiting the term of the franchises thereby granted to "the time any such person, company, corporation or association, or their assigns, shall maintain and operate any such water works."

15. And the said complainant further avers that none of the said terms, conditions and restrictions in said ordinance or in said contract contained, or arising out of the public nature of the duty assumed by the said American Water Works Company have been waived, changed or modified by the said city of Omaha, but the same have been at all times preserved in full force and effect.

16. In and by said ordinance No. 423, and the said contract hereinbefore mentioned, this complainant fully and lawfully provided that the said franchises, privileges and rights, and the duty and responsibility thereunder of supplying the city of Omaha and its inhabitants with water for any or all purposes, which said duty and responsibility is of vital importance to the health, welfare and prosperity of the said city, its citizens and inhabitants, should not in any event or under any circumstances fall into the hands, control and management of any person, corporation, power or authority not selected or expressly consented to by it, the said city.

768 17. And the complainant further says that the rights, privileges and franchises granted and conferred by said ordinance No. 423, have by the terms and conditions of said last named ordinance become ended and fully terminated in that by the fault of the said American Water Works Company, as is hereinafter more fully set forth, the said water works are not, and for a year or more past have not been maintained and operated by the person, company, corporation or association to whom the said rights, privileges and franchises were granted, nor by any assign of such person, company, corporation or association; but the said works are now, and for more than a year last past have been maintained and operated by the circuit court of the United States for the District of Nebraska through its officers and agents; and by virtue of the premises the said contract is at an end. And further in this behalf the complainant says:

18. Under and by virtue of the contract between the city of Omaha and the said Sidney E. Locke, which by assignment came to and was assumed by the American Water Works Company, defendant herein, and more particularly under and by virtue of the provisions of said ordinance No. 423 so made a part of said contract, it became and was the duty of the said American Water Works Company to maintain and operate the said water works plant for the supplying of the said city of Omaha and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes, and the right of said company to have any right of way along, upon and under the public streets, alleys, public squares and public places of said city for the purpose of placing and repairing mains, pipes and other fixtures, was made dependent upon the time said company

should maintain and operate said system of water works, which right became forfeited and terminated upon the failure of said company to so continue to maintain and operate said water works plant.

19. Under and by virtue of the provisions of said ordinance No. 423, and more particularly under the provisions of section 11 of said ordinance, the franchise granted by the city of Omaha under said ordinance and said contract became forfeited upon the failure of the said American Water Works Company, to comply with the provisions and requirements of said ordinance, and said company has failed to comply with the provisions of said ordinance and said contract, and has failed to maintain and operate said water works plant in that by its own wilful and wrongful conduct, it has allowed the said water works plant to pass from under and beyond its control, 769 whereby it has become absolutely powerless to comply with any of the provisions of said ordinance and contract, and for a long time has failed to operate and maintain said water works plant, and by reason whereof all the rights, privileges and immunities, granted and acquired by the American Water Works Company under said ordinance, contract and assignment have become forfeited, and the said city of Omaha has thereby become vested with the ownership thereof, and is entitled to take possession, control and management of the said water works plant, and property appertaining thereto and connected therewith, and hereby declares said franchise to be forfeited, and reinvested in your orator; and said contract stayed, and hereby asserts and claims its rights to take possession and control of the said water works plant, and all the property connected therewith or appertaining thereto.

20. And your orator further avers that by the said ordinance No. 423 and the said ordinance No. 430 which ordinances were made part of said contract, it was made the duty of the party maintaining and operating said water works system to provide machinery of such power that the hydrants used for fire protection should, not only when constructed, but always thereafter, have the capacity and power to afford ample protection to property against fire for a radius of one thousand feet from each and every one of the same without the aid of either steam or hand engines; and that the said machinery should have and maintain capacity and power to perform certain tests particularly enumerated in section 3 of said ordinance No. 423.

But your orator says that for several years last past by reason of the addition of new mains and new hydrants as provided for in said contract the pressure of water at said hydrants has been wholly insufficient to furnish the fire protection and to perform the tests aforesaid, as has been at all times well known and repeatedly brought to the notice of all parties operating and maintaining said works.

Your orator further says that in and by section 11 of said ordinance No. 423, it was expressly stipulated that "in case of the refusal or neglect of any person, company or corporation or their assigns who shall construct water works under this ordinance to comply with the provisions and requirements herein contained and each thereof and to keep such water works in good order and repair and ready and fit for immediate and constant use in accordance with the requirements

770 of this ordinance, * * * all the rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited * * * ."

Wherefore your orator says that by reason of the refusal and neglect aforesaid to maintain the said machinery so as aforesaid required by said sections 3 and of sufficient power and capacity to afford ample protection to property against fire for a radius of one thousand feet from each and every one of said hydrants without the aid of either steam or hand engines, the said franchise in and by virtue of said section 11 has become forfeited.

21. Thereafter, and on or about the first day of July, 1887, the said American Water Works Company made and executed a purported mortgage upon all the property of the said water works plant including said franchises, privileges and immunities granted by the city of Omaha, to the Farmers' Loan & Trust Company, trustee, for the purpose of securing an indebtedness evidenced by bonds in the sum of four million dollars, and subsequently, and on or about the 16th day of January, 1889, made and executed its supplemental mortgage to further secure said issue of bonds, copies of which said two mortgages are attached to and made part of the original bill herein filed, to which copies the complainant prays leave to refer as though the same were hereunto attached and made part hereof.

22. And the complainant alleges that all and singular the tangible and other property described in said mortgages or either of them and is absolutely essential to the operation of the said water works, and to the performance of its public duty so as aforesaid then lying and being on said American Water Works Company, and that without the same and every part thereof the said American Water Works Company could not perform its said obligations nor fulfill its said contract. Wherefore your orator says that the said property could not lawfully be mortgaged by the said American Water Works Company without the authority and consent thereto of the said complainant.

23. But the complainant further alleges that it never in any manner authorized nor consented to the making of the said mortgages nor either of them nor in any manner nor at any time ratified or sanctioned the said mortgages or either of them.

24. Your orator charges that the said mortgages and both of them were made in violation of the rights of the complainant and of the public duty and the contract aforesaid, since the effect thereof would be to deprive the said American Water Works Company of
771 the power and ability to perform its said duty and fulfill its said contract, and that by reason thereof the said mortgages and each of them so far as they pretend to grant any power to sell the said mortgaged property, were and are wholly ultra vires and null and void.

25. And your orator charges that the said defendant The Farmers' Loan & Trust Company, and each and every of the present holders of any of said bonds from the recitals in said mortgage and bonds were bounden to know at all times that the said franchises, privileges, immunities and properties could not be lawfully mort-

gaged without the authority and consent of the complainant, and were bounden to ascertain at their peril whether such authority and consent had ever been given. And the complainant further charges that whatever interest the said Farmers' Loan & Trust Company, and the said bondholders may have acquired in said premises the same was taken by them respectively subject to all the rights of the complainant in said property, franchises and privileges with full notice thereof, or with notice of such facts and circumstances as would make it incumbent upon them to inquire as to such rights, which inquiry would have fully advised them of the said rights of the complainant in the premises.

26. And this complainant avers that the said mortgagee, one of the defendants herein, if it acquired any interest whatever in the premises, matters and things by said mortgages purported to be conveyed (which this complainant expressly denies), took such interest subject to all the terms, conditions and limitations of said ordinance No. 423, and more especially subject to the said limitation of the franchise therein granted, to the time during which the said works should be maintained and operated by the person to whom they were granted, or his assigns, and to the provisions relating to forfeiture contained in section 11 of said ordinance; and that the purchaser of any bond purporting to be secured by said mortgage, bought subject to the same terms, conditions and limitations, anything in said mortgages or either of them to the contrary notwithstanding.

27. The said mortgages and both of them were null and void as against this complainant, more especially in that they attempted to authorize and confer a power to sell and convey to a purchaser or purchasers, not selected or consented to by the said city, the several rights, privileges, franchises, duties and responsibilities by said ordinance No. 423 and the said contract of which the said ordinance is a part, conferred and devolved upon the said S. E. Locke; of all of which the said trustee under said mortgages at the time it received the said mortgages, and each and every purchaser of bonds
772 purported to be secured thereby at the time of such purchase is bound to take notice, anything in said mortgages, or either of them, or in said bonds contained to the contrary notwithstanding.

28. Your orator represents that on or about the months of March, 1891, the said defendant the American Water Works Company, in violation of its contract with the city of Omaha, entered into a scheme of consolidation and amalgamation of the water works plant at Omaha with the water works plant at Denver, which last named plant was owned by the Denver City Water Works Company, a corporation of the State of Colorado, to accomplish which end there was created under the laws of the state of New Jersey a corporation known as the American Water Works Company of New Jersey; that the defendant the American Water Works Company, on or about the 26th day of April, 1891, made, executed and delivered to the New Jersey Company a deed whereby it purported to convey to the said New Jersey corporation all its works, properties, franchises, easements, choses in action, of every kind, character and nature whatsoever, all

of which was done without the knowledge or consent of your orator, the city of Omaha, and your orator never did consent to, ratify or approve the said transfer of the said property and franchise to the said New Jersey corporation.

29. Your orator further represents that the said sale and transfer of the said water works plant and of the property belonging to the said defendant the American Water Works Company to the said New Jersey corporation was illegal and void for want of authority on the part of the defendant the American Water Works Company to enter into such contract of conveyance, and for want of the consent of this complainant, and for the more particular reason that certain of the stockholders, of the said defendant the American Water Works Company did not consent thereto, but upon the contrary made special objection thereto, and among others was the United Water Works Company, Limited.

30. Thereafter the said United Water Works Company, Limited, brought its certain action in the circuit court of the United States for the District of Nebraska against the said defendant the American Water Works Company and the said New Jersey corporation charging that the said consolidation of the defendant the American Water Works Company with the New Jersey corporation was illegal and void, for various and particular reasons in its bill of complaint set forth, and prayed the court to enter its decree annulling and setting aside said transfer of the Omaha property to the New Jersey corporation and decreeing the deeds of conveyance of the said property and franchises to the New Jersey corporation to be illegal and void, and for a restoration to the said defendant the American Water Works Company of said property and franchise.

31. Afterward in said proceedings proofs were duly taken and afterwards upon full consideration the Circuit Court of the United States for the District of Nebraska entered its decree therein setting aside said consolidation of the Omaha property with the New Jersey corporation as illegal and void which said decree by its terms reinvested the title to all of said property in the defendant the American Water Works Company with the same force and like effect as if the same had never been transferred to the New Jersey corporation, which said decree is in full force and effect and no proceedings have ever been had to vacate or set aside the same. For a more particular recital of said pleadings and said decree reference is had to the records and orders of said court in said cause.

32. By reason of the premises last above recited the said New Jersey corporation has no interest whatsoever in the property of the water works plant, and yet so it is that by reason of the appointment of said receivers hereinbefore mentioned, the said defendant the American Water Works Company was never let into the actual possession and control of the said property, but the same continued to remain under the control and direction of the court, and continued to be operated by said receivers, and all of which was and is a violation of and in contravention of the obligations of the said defendant the American Water Works Company to your orator, and constitute a failure on its part to comply with the terms of the fran-

chises granted by the City of Omaha and brings the term of said franchises and said contract to an end.

33. On the 9th day of October, 1893, the Farmers' Loan & Trust Company filed its bill of complaint in the Circuit Court of the United States for the District of Nebraska to foreclose the said consolidated and supplemental mortgages upon the water works plant hereinbefore referred to, and impleaded as defendants therein the American Water Works Company (of Illinois), the American Water Works Company (of New Jersey), A. B. Hunt, temporary receiver, and E. Hyde Rust as suspended receiver of the New Jersey corporation.

34. Afterwards, on the 13th day of October, 1893, and in the said foreclosure proceedings the said court made its order appointing Ellis L. Bierbower and Alonzo B. Hunt receivers of the said defendant the American Water Works Company, to take possession and control of all and singular its goods, rights, franchises, choses
774 in action and property, both real and personal, of every name and nature, which said receivers thence hitherto have remained in possession of said property maintaining and operating the same.

35. Afterwards further proceedings were had in said cause by which the said court upon due consideration on the 24th day of June, 1895, entered its decree of foreclosure and found to be due upon the bonds secured thereunder the sum of \$4,159,054.18, and further ordered, adjudged and directed that upon the failure of the said water works company to pay into court the said sum of money within a period of two months from date of said decree, that all and singular the mortgaged premises be sold at public auction by and under the direction of one of the masters of said court, a copy of which said decree is hereto attached and made a part hereof as Exhibit E.

36. In the said foreclosure proceedings the complainant was not made a party and is not bound by anything therein determined, nor have the rights of the complainant, nor the question whether the said mortgages are void as against it ever been adjudicated, but on the contrary thereof all the rights and claims of the complainant in and about the premises are the same as though said foreclosure proceedings had never been had.

37. Under and by virtue of said decree an order of sale directing the selling at public auction of the matters and things pretended to be mortgaged as aforesaid was issued, whereupon the complainant began its suit in this honorable court wherein the complainant set up its rights and interest in the premises and sought to have such sale enjoined, but upon a hearing therein had upon a motion for a temporary injunction the court refused to enjoin such sale, assigning as the sole reason therefor that if the contentions therein made by your orator, were right, your orator would not be prejudiced in any manner by said sale, and those who might become purchasers thereat would take nothing thereby as against this complainant.

38. And the complainant further says that on the 20th day of May, 1896, said order of sale was executed by one of the masters in chancery of this court, and all the matters and things pretended to be

conveyed in and by said mortgages were pretended to be sold at such sale. But the complainant says that no part of the price bid therefor has been paid and no deed has been delivered to the purchaser at such pretended sale, and that the mortgaged premises all and singular remain as prior to such pretended sale in the possession and control of this court through its said receivers.

775 39. The complainant now charges the fact to be that by virtue of the matters and things hereinbefore set forth, the said pretended sale as to your orator was wholly null, void and of no effect; and that neither the said franchise, nor the said contract, nor the plant and tangible property of said American Water Works Company so as aforesaid essential to the exercise of said franchise and the performance of said public duty, nor any interest whatever in the same, passed by said pretended sale to those pretending to purchase thereat.

40. And the complainant further says that the defendant the Farmers' Loan & Trust Company was the pretended purchaser at said sale, and claims that thereat and thereby it acquired as trustee for the holder of certain of the aforesaid bonds the full and complete title to all the property constituting the plant of the said defendant the American Water Works Company, and the franchise so as aforesaid granted originally to the said S. E. Locke, and the right to maintain and operate the said water works plant in the exercise of said franchise and as successors to the party of the second part in said contract, and the right to furnish to the city of Omaha and to its inhabitants for the highly remunerative compensation provided for in said ordinance No. 423, water for fire protection and for public and private uses within the limits of said corporation, all of which claims are false and contrary to the just and equitable rights of your orator in the premises.

41. The complainant further says that the said Farmers' Loan & Trust Company itself has no power to maintain and operate a water works plant.

42. But the complainant further says that certain persons claiming to represent a part of the holders of said bonds and styling themselves "Bondholders' Committee" are now proposing and attempting to form under the laws of some other state than the state of Nebraska a joint stock company for the operation and maintenance of said plant, and to re-mortgage said property, franchise and *and* contract in the sum of \$7,500,000 and issue stock to the extent of \$1,750,000 and the Farmers' Loan & Trust Company, as your orator is informed and believes, has entered into an agreement to transfer to said company when so organized all the franchises, contract and property so as aforesaid claimed by it to have been acquired at said pretended sale, all of which unlawful plan and scheme will more fully appear reference being had to exhibit F, hereto attached and made part hereof.

43. And the complainant alleges that unless restrained and enjoined therefrom the said defendant the Farmers' Loan &
776 Trust Company will itself enter upon and take the possession, control, management, operation and maintenance of the said

water works plant and exercise said franchise, or will make a pretended deed and transfer of all of said franchise, contract and property to some company, corporation, association or person who will thereunder assume such possession, control, management, operation and maintenance, notwithstanding the fact now alleged that neither the said Farmers' Loan & Trust Company, nor any other company, corporation, association, person or persons (except the defendant the American Water Works Company) has any franchise, right or authority whatsoever derived directly or indirectly from the said city of Omaha to exercise the said franchise or to perform the said contract or to operate and maintain the said water works plant, and notwithstanding the fact now alleged, that no company, corporation, association, person or persons so situated can lawfully exercise said franchise, perform said contract and operate and maintain said plant. And the complainant further says that to have foreign corporation and strangers with whom the said complainant has no contract, and who were not selected by it, thrust upon it against its will and protest, to perform a public duty and office which more than all other duties and offices directly concerns the protection of the lives and property of its citizens, is wholly unjust and inequitable to the complainant and contrary to the mandates of public policy and to law.

44. This complainant further avers that notwithstanding the invalidity of said judicial sale, the said Farmers' Loan & Trust Company together with the said bondholders' committee, co-operating with it, assert and mean to assert that the said Farmers' Loan & Trust Company acquired a legal title to the said Water works property and said privileges and franchises, and that they mean and intend to assert title thereto and to take possession thereof, and to transfer the said property, rights, privileges and franchises to some other company by them to be hereafter organized and created, and to that end the said Farmers' Loan & Trust Company and the said bondholders' committee are attempting to form a re-organization, according to a published plan, which contains the following prominent features, to wit:

a. To organize a new company under the laws of the State of Maine, or under the laws of such other state as the committee may determine, to which all the property acquired at the foreclosure sale is to be conveyed.

b. That such new company shall be authorized to issue prior ten, twenty year five per cent gold bonds to the amount of
777 \$1,500,000, to be secured by a mortgage upon all of the franchises, rights, contracts and properties so acquired.

c. That the said new company shall also be authorized to issue a consolidated fifty year mortgage on all the franchises, rights, contracts and properties so acquired to secure gold bonds to the amount of \$6,000,000.

d. Said new company is to be authorized to issued first preferred five per cent non-cumulative stock to the amount of \$750,000.

e. The said new company is to be authorized to issue five per cent non-cumulative second preferred stock to the amount of \$1,000,000.

f. The said new company is to be authorized to issue common stock to the amount of \$2,500,000.

g. That in addition to the foregoing it is proposed to raise a large sum of money in cash- to-wit:

By assessment upon the holders of certificates for bonds deposited with the bondholders' committee \$540,000.

From sale of new stock to holders of old preferred stock \$400,000.

And from which sums of money it is proposed to use for counsel fees, expenses of foreclosure and by way of compensation to the committee for reorganization \$360,000.

45. The complainant avers that if said plan of reorganization is permitted to be carried out that two new mortgages hereinabove referred to will be placed upon the said property, rights, privileges and franchises, aggregating \$7,500,000, and this complainant upon information and belief avers that if mortgages of so large an amount are to be placed upon the property, that the inevitable result will be that the rights of a large number of persons, to-wit: the purchasers of the said issues of bonds to the amount of \$7,500,000, and the purchasers and holders of the new issues of stock to the amount of \$4,250,000 will become interested in the property adversely to the city of Omaha, and that by reason of the large sums of money involved, as well as from the large number of persons who will be interested therein, that vexatious and burdensome litigations will flow and that if said Farmers' Loan & Trust Company shall be permitted to enter into possession of the property and to convey the same to said reorganized company under the plan and scheme hereinbefore set forth, that said new mortgages, as well as the new issue of stock will create a cloud upon the title of this complainant to the said property, rights, privileges and franchises.

778 46. This complainant avers that the said Farmers' Loan & Trust Company, and said bondholders' committee will proceed with said plan of reorganization and will transfer said property to said newly created corporation, and which said newly created corporation will cause to be executed and delivered the said incumbrances and obligations upon and against the said water works property, rights, privileges and franchises unless this court shall enjoin the issuing of a deed to the said Farmers' Loan & Trust Company, and this complainant avers that whereas the title to said water works property, and the rights, privileges and franchises are now in dispute as between the city of Omaha and the defendants, and whereas, under the circumstances to permit a further conveyance of the property and to permit the placing thereon of further mortgages will cast a further cloud upon the title of this complainant to the said properties, this complainant avers, upon the advice of counsel, that it is a proper case for the appointment of receivers to take possession of the said property and franchises, and to hold, maintain and operate the same under the direction of the court until the matter in litigation in this proceeding shall be fully determined; and that the making of a deed to the Farmers' Loan & Trust Company be enjoined pending this litigation.

47. And the complainant avers that the said plant and franchises

greatly exceed in value the total amount of the bonded indebtedness, which amounts to the sum of \$3,600,000, whereas the value of said property is much greater than the sum for which the said bondholders' committee, as shown by the said Exhibit F propose to remortgage, the same, namely, \$7,500,000; and as the complainant is informed and believes and so charges the fact to be, the annual income from the operation of said water works is sufficient even during the present unfavorable times to pay all necessary expenses of operation and maintenance, together with the stipulated rate of interest upon all said bonds and leave an annual surplus of about \$50,000 to apply upon the principal of the same, which said surplus will necessarily largely increase from year to year with the natural growth of said city; wherefore it is assured that the said bonds could well be paid out of the earnings of said plant, even if said sale were set aside and held for naught as to this complainant, and the remedy of the bondholders were confined, as it ought to be, to a sequestering of the earnings of said plant.

48. The complainant further says that by the default and failure of said defendant the American Water Works Company as hereinbefore set forth, in accordance with section 11 of said ordinance this complainant now has the right to take possession of all said property as the owner thereof, paying therefor such sum as may be fixed by appraisers in the manner provided in section 14 of said ordinance No. 423, said section being fully shown in said Exhibit A heretofore made a part hereof.

49. And the complainant also says that in and by its charter, as will more fully appear by reference to Chapter 12A, Compiled Statutes of Nebraska, it has power to acquire said property by proceedings in condemnation or by proceedings under the said section 11, and that to that end it is the right of this complainant to have said property relieved and cleared from the cloud of the unlawful incumbrance aforesaid.

50. The complainant further says that the property is of such nature and engaged in such service that its continuous, uninterrupted operation is absolutely essential to the preservation of the lives and property of the said city of Omaha, and that pending the final determination of this controversy it is proper and desirable that some fit and suitable persons should be appointed by this court to perform the usual duties of receivers in reference thereto.

51. The complainant further avers that under and by virtue of the contract between the City of Omaha and the American Water Works Company the said city was obliged to pay on the first of July and the first of January of each year a semi-annual hydrant rental, aggregating \$48,000. This complainant avers that by reason of the premises hereinbefore pleaded the Farmers' Loan & Trust Company as purchaser at said sale is not entitled to have and receive the said hydrant rental in that it has acquired no right or interest thereto or in the said water works property by or under its said purchase at said judicial sale.

52. The complainant further avers that by reason of the premises last above pleaded the city of Omaha cannot pay the said hydrant

rental to either the said Farmers' Loan & Trust Company or to any other person or company to whom the said Farmers' Loan & Trust Company might convey or transfer the said water works property, without the same being considered a waiver on the part of the city of Omaha of its right to declare a forfeiture of the said contract and franchise and also a waiver of the right of the city to take possession of the said water works plant.

53. And by reason of the premises the complainant further avers that while it is willing to pay the amount of the said hydrant rental or so much thereof as may be found properly due for the use

780 of water for fire protection, pending this litigation it is unwilling to pay the same in any such form or to any such person or company as might operate as an estoppel against the city to plead and assert its rights against any such person or company, and therefore prays the court that receivers may be appointed of the said water works property pending this litigation, who can maintain and operate the same under direction of the court and who may be authorized to receive and hold said hydrant rental, and use and disburse the same under direction of the court for the use and maintenance of the water works plant.

54. Your complainant further avers that pending this litigation it will not only be proper but necessary to locate and relocate fire hydrants and to enlarge certain water mains and to extend other water mains to meet the needs and necessities of the city, and it will also be necessary to make connection with private residences and public buildings for the supplying of the same with water, and it is also necessary and has already been planned to lay an entire new line of water mains from the pumping station at Florence to the reservoir located on Walnut Hill in the City of Omaha, being a distance of several miles in length, and your complainant avers that it cannot either negotiate with or contract with the said Farmers' Loan & Trust Company, or with any other person or corporation to whom it might transfer said water works plant for the location or relocation of fire hydrants or the laying or extension of water mains without thereby waiving its right to insist upon the forfeiture of said franchise and of its right to take possession of said water works property.

55. The complainant further avers that it cannot even permit the said Farmers' Loan & Trust Company, or any other person or company to whom it might transfer said water works plant to dig up the streets in the city of Omaha for the purpose of locating or relocating fire hydrants, or for the purpose of laying or extending water mains, without to that extent recognizing the right of said Farmers' Loan & Trust Company or its grantee so to do.

56. Complainant further avers that neither can it permit the said Farmers' Loan & Trust Company, or its grantees or assigns, to furnish water through the said pipes and mains to the inhabitants of the City of Omaha, and to collect and receive from the said inhabitants compensation for the said water so supplied, without thereby and to that extent recognizing the right of the said Farmers' Loan & Trust Company, its grantee or assigns, to enter into and upon the said streets, for the purpose of making repairs and extension.

781 Yet your complainant recognizes the necessity for the maintenance and operation of the said water works plant, pending this litigation, and until the right of the city in the premises shall be fully adjudged and determined, and prays that receivers of the water works plant may be appointed by this honorable court, to maintain and operate the said water works plant and to make such repairs and improvements as may be necessary and collect and receive the compensation to be paid by the inhabitants of the city of Omaha for water furnished to them.

57. Your orator avers the matters involved in this litigation are of great value, and exceed the sum of two thousand dollars (\$2000) exclusive of costs and interest, and your orator is advised and avers that the rights of all the parties interested can be ascertained and fully determined and protected by this proceeding in equity but that your orator is remediless in the premises by the rules of common law, and can have adequate relief only in a court of equity where matters of this nature are properly cognizable and relievable.

a. Therefore your orator prays that the Farmers' Loan & Trust Company, a corporation created by and existing under the laws of the State of New York and a citizen of the State of New York and having its principal office and place of abode in the city of New York, and the American Water Works Company, a corporation created and existing under and by virtue of the laws of the state of Illinois, and Thaddeus S. Clarkson, receiver of the American Water Works Company of Illinois, a citizen of the State of Nebraska, and having his residence in the City of Omaha, State of Nebraska, and Ellis L. Bierbower and Alonzo B. Hunt, receivers of the American Water Works Company, both being citizens of the State of Nebraska and residents of the City of Omaha, be made parties defendant herein.

b. And that your honors direct and order that no deed of transfer of any kind of the property so as aforesaid claimed to have been sold, be issued or made to the said defendant the Farmers' Loan & Trust Company, but that said sale be decreed and held to be as to this complainant wholly null, void and without effect.

c. And that it may please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, directed to said Farmers' Loan & Trust Company, defendant, commanding, enjoining and restraining the said defendant from taking possession of said

782 property or any thereof, and from attempting to operate, manage, control or in any way interfere therewith, and from asserting any right, interest or claim therein, either for itself or any of its cestui que trusts as against the complainant, and from making any deed or other transfer or conveyance of any of the property so as aforesaid pretended to have been sold at the sale.

d. And that upon the filing of this bill of complaint a temporary restraining order issue as above prayed for.

e. And that the court appoint a receiver or receivers of the said water works plant and of all the property connected therewith or incident thereto, and who shall retain the possession thereof and maintain and operate the same under the direction of the court pend-

ing this litigation and who shall have authority by and under the direction of the court to make such repairs, extensions and improvements as may be found to be or become necessary pending this litigation, and who shall have authority to collect and receive compensation from the city for water furnished for fire protection and from the inhabitants of the city for water for private and domestic uses and who shall have such other authority as is usually conferred upon and exercised by receivers in like cases.

f. And that upon a final hearing of this cause a decree shall be entered making said injunction perpetual, and for such other and further relief in the premises as to this honorable court shall seem meet.

g. And your orator further prays that it may be adjudged, determined and decreed that the said franchise and the said contract in the bill of complaint described as granted by the City of Omaha for the construction of said water works plant has become ended and the same is forfeited to the said city of Omaha, and that your orator's right and title thereto may be quieted and become reinvested in the said city of Omaha, and that any claim to the same made or insisted upon by any or all of the defendants be held for naught, and that they each and all be enjoined and restrained from asserting or undertaking to maintain any rights or privileges under and by virtue of the said franchise or the said contract.

h. And your orator further prays that it may be adjudged, decreed and determined that your orator has a right to take the immediate possession of all the tangible property of the water works plant of every kind and nature, including all of the property hereinbefore more particularly described in the said decree of foreclosure, and that your orator may be permitted immediately after the taking of possession of the said property to proceed to determine the value thereof by condemnation proceedings or by appraisal, as it may elect or as this honorable court may determine.

i. And your orator further prays to that end that your orator may acquire not only the right to but the possession of said property free from the claims of third persons thereto, or therein and free from pretended liens and incumbrances thereon; that it may be adjudged and decreed that the said mortgages in said bill of complaint referred to and hereto attached as Exhibits "A" and "B" are null and void as against your orator; and that they may be cancelled and held for naught, and that it be further adjudged and decreed that they do not constitute any lien upon the said property of the said water works plant nor upon the said franchise granted thereunto by your orator the city of Omaha.

And that your orator may have such further and other relief in the premises as the nature and the circumstances of this case may require and to this honorable court shall seem meet.

And your orator, in duty bound, will ever pray.

W. J. CONNELL,
Solicitor for Complainant.

W. J. CONNELL,
Of Counsel.

DOUGLAS COUNTY, STATE OF NEBRASKA,

District of Nebraska, United States of America, ss:

William J. Connell, being first duly sworn, deposes and says that he is the city attorney of the city of Omaha, and that the city of Omaha is a municipal corporation created, organized and existing under the laws of the State of Nebraska, as a metropolitan city.

This affiant has read the foregoing bill, and knows the contents thereof, and says that the matters and things in said bill set forth are true of his own knowledge except as to those matters which are therein stated to be upon information and belief, or upon advice of counsel, and as to those matters he believes the same to be true.

W. J. CONNELL.

Sworn before me this the 13th day of July, 1896.

[NOTARIAL SEAL.]

ELIZABETH VANSANT;

Notary Public, Douglas County, Nebraska.

Commission expires March 1, 1901.

784 (On the margin of this appears in red ink: "Exhibit A.")

*Ordinance No. 423.***An Ordinance to Authorize and Procure the Construction and Maintenance of Water Works in the City of Omaha, State of Nebraska.**

Be it ordained by the City Council of the City of Omaha:

SECTION 1. Any person, company, corporation or association who shall erect, construct and maintain water works upon the principle of a combined system of direct pressure and reservoir, of the capacity, magnitude and character hereinafter described, and as more fully and at large appears in the report and appendix tables of J. D. Cook, engineer, filed in the office of the city clerk of the city of Omaha on the 25th and 31st day of May A. D. 1880, and as finally approved by the city council of said city on the 8th day of June A. D. 1880, within and adjacent to the city of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof with water, for domestic, mechanical, public and fire purposes, shall have the right of way along, upon and under the public streets, alleys, public squares and public places of said city for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such persons, company, corporation or association, or their assigns, shall maintain and operate any such water works, and while constructing the same, upon the terms and conditions hereinafter mentioned.

SEC. 2. The water supply for all such water works shall be taken direct from the current of the Missouri River at a point or points fairly adapted to the purpose north of the present site of the Omaha Smelting and Refining Works, and above the sewerage of said City of Omaha, and no filth from said sewerage shall be allowed to mix

or intermingle with said water supply; and said water, by the best systems of purification and by proper settling reservoirs, shall be settled, cleansed and purified, and shall be good, clear water, suitable for culinary and drinking purposes, and not detrimental to the health of those who use it.

SEC. 3. The pumping machinery of any such water works shall have an easy aggregate capacity to pump at least five million (5,000,000) gallons of water each and every twenty-four hours, and shall be increased as the growth of the city and its needs require; and shall have sufficient power to throw at any one time at the elevation
785 of Fourteenth and Farnam streets in said city through one inch nozzles, eight streams of water, each stream to the height of one hundred and ten feet, and also at any one time, but at a different time from the test aforesaid, at the elevation of the base of the High School building in said city, through one inch nozzles four streams of water, each stream to the height of one hundred feet; and also at any one time, but at a different time from each of the tests aforesaid, two streams of water at the elevation of Eleventh and Pierce streets, two streams of water at the elevation of Fourteenth and Farnam streets and two streams of water at the elevation of Sixteenth and Grace streets, each stream to the height of one hundred feet. The reservoirs shall have a capacity of at least nine million (9,000,000) gallons of water (amended Ordinance 430).

SEC. 4. The water mains of any such water works shall be substantially of the sizes and lengths set forth in the report of J. D. Cook as adopted, heretofore referred to. Said mains to be cast and tested at the expense of the party building said works under the supervision of an experienced foundry inspector to be appointed by the city of Omaha, shall stand a pressure of three hundred pounds to the square inch at the foundry where made and one hundred and sixty pounds pressure to the square inch after they are laid in the streets of Omaha, all of said mains to be cast vertically in dry sand.

SEC. 5. The location of none of said mains, pipes, fixtures or hydrants in the public streets, alleys, public squares and public places of said city must interfere with sewers previously constructed or in process of construction, or with gas pipes previously laid, and must be located without any unnecessary injury or public inconvenience. For the purpose of laying and placing in position said mains, pipes, fixtures and hydrants, or to repair, re-lay or change the same, any such person, company, corporation or association, or their assigns, shall have the right to disturb, remove and dig up the surface and materials of the streets, alleys and public squares and public places of said city, while they shall be entitled to said right of way and during the time necessary for said work; provided, the materials so disturbed shall be replaced carefully without any unnecessary delay at their expense, leaving and keeping said places for one year in as good condition as before, so far as practicable, and shall hold and save the city harmless from any damage resulting from the displacement or replacing of said materials, or from the locating, placing or laying of said mains, pipes, fixtures and hydrants, or any of them.

786 SEC. 6. All such water works shall be so constructed, and the mains, pipes and other fixtures thereof so located, placed and laid as to allow of and render feasible the locating, placing, erecting and constructing of not less than two hundred and fifty fire hydrants of the latest and most approved patterns and styles, and of the most substantial kind, to have two or more nozzles and be of such sizes as the city council may require. Said hydrants shall be placed at the points on the public streets of said city designated in the adopted report of J. D. Cook, heretofore referred to, subject to such change of location as the city council of Omaha may at any time designate; Provided, that such change shall not be beyond the distribution of the mains of said water works company, and shall have the capacity and power to afford ample protection to property against fire for a radius of one thousand feet from each and every one of said hydrants, without the aid of either steam or hand engines. If the locality of hydrants shall be ordered changed after they have been set under the direction of the city council, said change of location shall be at the expense of the city (Amended Ordinance 430).

SEC. 7. Any person, company, corporation, association or their assigns, who shall construct any such water works shall build substantially fire-proof all buildings and other structures necessary for their machinery or any apparatus that may be needed for their legitimate purposes.

SEC. 8. Any person, company, corporation or association, their assigns, who shall construct any such water works shall furnish water to the city of Omaha free of charge for the following purposes, to-wit: for Hanscom Park a quantity sufficient for the necessary fountains therein not exceeding four in number, one hydrant for drinking purposes and one for sprinkling purposes in said park; for the public schools of the city of Omaha drinking water and such further quantity as may be necessary for general use at the same, for ten drinking fountains for both man and beast, to be located along the said water mains or contiguous to the same at suitable points upon the streets of said city as shall be designated by the city council after said water mains are laid in said streets, or while the same are being laid or placed therein, a supply of water adequate to meet the wants of the public and make said drinking fountains answer for the purpose intended, and water for flushing sewers and for sanitary purposes in the washing out of gutters and ditches in the streets and alleys of said city under the control of the board of health of said city.

787 SEC. 9. Before the placing of water mains or pipes upon a street of said city not having an established grade, the grade of said street shall be established.

SEC. 10. Any person, company, corporation or association, or their assigns, who shall construct such water works shall furnish water to citizens residing along the line of said mains, or contiguous to the same, at all times when any such water works shall be maintained at rates which shall not exceed the following tariff, to-wit:

Tariff of Water Rates.

	Per annum.
Dwelling houses, not exceeding five rooms.....	\$6.00
Each additional room.....	.75
Banks, including one wash basin.....	10.00
Bakeries, average daily use for each barrel of flour.....	3.50
Barber shops, one chair.....	5.00
Barber shops, each additional chair.....	2.50
Bath houses, public, per tub.....	\$7.00 to 15.00
Bath rooms, private, per tub.....	3.50
Bath rooms, each additional tub.....	2.00
Blacksmith shop, one fire.....	3.00
Blacksmith shop, each additional fire.....	1.50

Building Purposes—Brick Work.

Tempering mortar and wetting brick per M, kiln count....	\$.05
Tempering mortar only, per M.....	.02
Making mortar, per M.....	.05

Stone Work.

Making mortar, per perch of 16½ cubic feet.....	.05
Tempering mortar, per perch of 16½ cubic feet.....	.02

Plastering.

Making mortar, two-coat work, per 100 square yards.....	.10
Making mortar, three-coat work, per 100 square yards.....	.15
Breweries, distilleries, rectifiers and malt houses (estimated at 100 gallons of water used per barrel manufactured), per 1,000 gallons.....	.15
Butchers' stalls and shops.....	\$4.00 to 8.00
Billiard saloon, one table.....	5.00
Billiard saloon, each additional table.....	1.50
Book bindery.....	\$10.00 to 15.00
788 Bars and drinking saloons.....	10.00 to 30.00
Candy manufactories.....	8.00 to 30.00
Cigar manufactories, five hands and under.....	5.00
Cigar manufactories, every hand over five.....	1.50
Dray, team and street railroad horses, including washing of drays, wagons and cars, each horse.....	1.50
Dyeing and scouring, including laundries.....	15.00 to 40.00
Eating saloons.....	10.00 to 30.00
Fountains flowing not exceeding six hours per day during the season, ⅛ inch orifice.....	5.00
During the season, 3-16 inch orifice.....	12.00
During the season, ¼ inch orifice.....	25.00
During the season, 5-16 inch orifice.....	45.00
Filling private cisterns, furnishing water only, each time..	1.00
Hotels and boarding houses, per room, wash basin, same as private houses.....	1.00

Street sprinkling by hose, including washing and sprinkling sidewalks, 50 feet front or less	5.00
Each additional foot10
Sprinkling lawns, per 1,000 square feet, no charge less than \$5.00	1.00
Livery and other public stables, including washing carriages, each horse	2.50
Offices and sleeping rooms, including wash basin .. \$3.00 to	10.00
Printing offices, according to the number of presses and persons, not including steam engines	6.00 to 40.00
Private stables, including washing carriages, one horse	3.00
Same, two horses	5.00
Each additional horse	1.00
Public halls	5.00 to 20.00
Photograph gallery	10.00 to 20.00
Steam engines to be assessed as per nominal horse power of ten hours' run	2.50
Street sprinkling with wagon, each team employed per day ..	.50
Stores	5.00 to 15.00
Steam boilers, for house warming, etc., each square foot of surface, no charge less than \$5.0030
Tobacco manufactory, per hand, no charge less than \$5.00 ..	1.00
Urinals, with constant flow	10.00
Urinals, private	3.50
789 Wash basin, stationary, first basin in dwelling free; all others, each	1.00
Water closets, in public houses per bowl	5.00
Water closets, in private houses, per bowl	2.50
Each additional, per bowl	1.50
Workshops, ten persons or under	5.00
Each additional person25

Rents for all purposes not herein named will be fixed by meter measurement, as may be agreed upon between the consumer and water company, not exceeding meter rates.

Meter Rates.

Gals. per day.	Rate per 1,000 gals.
100 to 500	35c.
500 to 1,000	30c.
1,000 to 2,000	25c.
2,000 to 4,000	20c.
Over 4,000	15c.

SECTION 11. In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this

ordinance (a reasonable time being allowed for repairs in case of accident), all rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said city of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works, and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in section 14 of this ordinance; Provided that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation.

SEC. 12. Within ten days after the passage of this ordinance the city clerk of the City of Omaha shall advertise for sealed proposals to be received thirty days after the first insertion of such advertisements for furnishing the city of Omaha with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works as fixed by the terms of this ordinance, through two hundred and fifty fire hydrants of the character and of the locations mentioned in this ordinance. The said advertisement by said city clerk shall be inserted for thirty consecutive days in each of the daily newspapers published in this city, 790 and shall also be published in such other papers as the city council may by resolution require. Such proposals or bids shall be accompanied by a bond with at least three resident sureties in the sum of twenty-five thousand (\$25,000) dollars, conditioned, in the event of the acceptance of the bid and awarding of the contract for such public supply and fire protection to such bidder or bidders, for the faithful performance of the terms and conditions of this ordinance, and that the water to be furnished through said hydrants shall at all times when required during said term (a reasonable time being allowed for repairs in case of unavoidable accidents) perform the tests mentioned in this ordinance, and give the fire protection herein mentioned; said bids shall specify the price per hydrant per year for the said two hundred and fifty hydrants during said term; also the price per hydrant, per year for intermediate hydrants placed upon the mains specified in said report of J. D. Cook in excess of the said two hundred and fifty; and also the price per hydrant per year in case the city at any time during said term elects to have more hydrants upon new mains, such last mentioned additional hydrants, when distributed along new mains, to be substantially at the same relative distance as those provided for in the report of J. D. Cook. Said bids shall also be accompanied by a conditional acceptance of this ordinance in the event the contract for the public supply and fire protection shall be awarded. The contract for such public supply and fire protection shall be awarded to the lowest responsible bidder, and the city clerk shall in such advertisement insert the clause that the city council reserve the right to reject any and all bids. (Amended ordinance 430.)

SEC. 13. The said water works shall be constructed and completed within one year from and after the date of the award of the contract for public supply and fire protection, unless the city council shall by ordinance extend said time (Amended ordinance 469).

SEC. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company and these two to select the third; Provided that nothing shall be paid for the unexpired franchise of said company.

SEC. 15. This ordinance shall take effect and be in force from and after its passage. (Passed June 11, 1880.)

(Signed)

JAMES E. BOYD,
Pres't City Council.

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Attest:

J. F. McCARTNEY,
City Clerk.

Approved June 11, 1880.

(Signed)

CHAMPION S. CHASE, *Mayor.*

(On the Margin of this Appears in Red Ink: "Exhibit B.")

Ordinance No. 430.

An Ordinance to amend sections three (3), six (6), and twelve (12) of ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, State of Nebraska."

Be it Ordained by the City Council of the City of Omaha:

SECTION 1. That section three (3) of ordinance No. 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska," passed June 11, A. D. 1880, be, and the said section is hereby amended so as to read as follows:

"SEC. 3. The pumping machinery of any such water works shall have an easy and aggregate capacity to pump at least five million (5,000,000) gallons of water each and every twenty-four hours, and shall be increased as the growth of the city and its needs require, and shall have power sufficient to throw at any one time, (but not at the same time that the machinery is pumping at the rate of five million (5,000,000) gallons per day into the reservoir) at the elevation of Fourteenth and Farnam Streets, in said city, through one inch nozzles, eight streams of water, each stream to the height of one hundred and ten feet, and also at any one time, but at a different time from the test aforesaid, at the elevation of the base of the High School building in said city, through one inch nozzles, four streams of water, each stream to the height of one hundred feet; and also at any one time, but at a different time from each of the tests aforesaid, two streams of water at the elevation of Fourteenth and Farnam Streets and two streams of water at the elevation of Eleventh and Pierce streets, and two streams of water at the elevation of Sixteenth and Grace streets, each stream to the height of

one hundred feet. The reservoir shall have a capacity of at least nine million (9,000,000) gallons of water."

SEC. 2. That section six (6) of said ordinance No. 423 be amended, and said section is hereby amended, so as to read as follows: "SEC. 6. All such water works shall be so constructed, and the mains, pipes, and other fixtures thereof so located, placed and laid as to allow of and render feasible the locating, placing, erecting and constructing of not less than two hundred and fifty fire hydrants of suitable style and capacity, and to be properly protected against frost. Said hydrants shall be placed at the points upon the public streets of said city designated in the adopted report of J. D. Cook, heretofore referred to, subject to such change of location as the city council of Omaha may at any time designate; Provided that such change shall not be beyond the distribution of the mains of said water works company, and shall have the capacity and powers to afford ample protection to property against fire for a radius of one thousand feet from each and every one of said hydrants, without the aid of each stream or hand engines. If the locality of hydrants shall be ordered changed after they have been set under the direction of the city council, said change of location shall be at the expense of the city."

SEC. 3. That section twelve (12) of said ordinance No. 423 be and the same is hereby amended so as to read as follows:

"SEC. 12. The city clerk of the city of Omaha, shall advertise for sealed proposals, to be received by him in his office in the City of Omaha, Nebraska, until 12 o'clock, noon, on the twentieth day of July, A. D. 1880, for furnishing the city of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works as fixed by the terms of this ordinance, through two hundred and fifty fire hydrants of the character and of the locations mentioned in this ordinance. Said advertisements shall be inserted in each one of the daily newspapers published in the city of Omaha, for each day that such newspaper may be issued, during the term commencing July 16, A. D. 1880, and ending July 20, 1880, inclusive. Said proposals, or bids, shall be accompanied by a bond with at least three sureties in the sum of twenty-five thousand (\$25,000) dollars, conditioned, in the event of the acceptance of the bids and awarding of the contract for such public supply and fire protection to such biader or bidders, for the faithful completion of said water works in accordance with the terms and requirements of this ordinance and ordinance No. 423, and for such compliance for the further term of one year after the completion of said water works, and that the water to be furnished through said hydrants shall, at all times when required during said term (a reasonable time being allowed for repairs in case of unavoidable accidents) perform the tests mentioned in this ordinance, and give the fire protection herein mentioned." Said bids shall specify the price per hydrant per year for the said two hundred and fifty hydrants during said term. Also the price per hydrant per year for intermediate hydrants placed upon the mains specified in said report of J. D. Cook, in

excess of said two hundred and fifty, and also the price per hydrant per year in case the city, at any time during said term, elects to have more hydrants, upon new mains; such last mentioned additional hydrants, when distributed along new mains, to be substantially at the same relative distance as those provided for in the report of J. D. Cook. Said bids shall also be accompanied by a conditional acceptance of this ordinance, in the event the contract for the public supply and fire protection shall be awarded. The contract for such public supply and fire protection shall be awarded to the lowest responsible bidder, and the city clerk shall, in such advertisement, insert the clause that the city council reserves the right to reject any and all bids."

SEC. 4. This ordinance shall take effect and be in force from and after its passage.

Passed July 14, 1880.

(Signed)

JAMES E. BOYD,
Pres't City Council.

Attest:

J. F. McCARTNEY,
City Clerk.

Approved July 15, 1880.

(Signed)

CHAMPION S. CHASE, *Mayor.*

(On the margin of this appears in red ink: "Exhibit C.")

Water Works Contract.

This contract made and entered into at Omaha, Douglas County, Nebraska, this 20th day of July, A. D. 1880, between the city of Omaha, party of the first part, and Sidney E. Locke, party of the second part, witnesseth:

Whereas, the City of Omaha did on the 11th day of June, A. D. 1880, pass its certain ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska," and did, on the 14th day of July, A. D. 1880, pass its certain ordinance No. 430, entitled "An ordinance to amend sections three (3), six (6) and twelve (12), of ordinance No. 423, entitled "An ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, state of Nebraska," and

794 Whereas, the city council of said city of Omaha did receive from J. D. Cook, engineer, on the 25th day of May, A. D. 1880, the report, and on the 31st day of May, A. D. 1880, the appendix to said report referred to in section one (1) of said ordinance No. 423, and did, on the 8th day of June A. D. 1880, adopt and approve said report and appendix; and

Whereas, the said City of Omaha did, in compliance with the provisions of said ordinance, advertise from the 16th day of July, A. D. 1880, to the 20th day of July, A. D. 1880, for sealed proposals for furnishing the city of Omaha, Nebraska, with water for fire protection and public use for the term of twenty-five years from the

time of the completion of said works, through two hundred and fifty hydrants, of the character and of the locations mentioned in said ordinances No. 423 and 430, and said report of J. D. Cook, engineer, as approved; and

Whereas, on said 20th day of July, A. D. 1880, at 12 o'clock noon, there were received and opened at the office of the city clerk of said City of Omaha certain bids and proposals, and among them the proposal and bid of Sidney E. Locke, party of the second part, which said proposal and bid of said Sidney E. Locke was the lowest and best bid received for such furnishing of said city with water for fire protection and public use; and

Whereas, the said city council of the city of Omaha did, on said 20th day of July, A. D. 1880, accept said proposals of said Sidney E. Locke did award said contract to him, and did order that the said contract should be formally made by the mayor of said city of Omaha, acting in its behalf.

Therefore, it is hereby contracted and agreed by and between said parties as follows:

In compliance with said ordinances Nos. 423 and 430 the said report of J. D. Cook, engineer, and the appendix thereto as approved by the said city council said advertisement, proposal and accepting thereof and awarding of said contract (all of which are herein recited as being understood to be parts of this contract) the said Sidney E. Locke, party of the second part, contracts and agrees with said party of the first part to erect, construct and maintain said water works in the city of Omaha, and to furnish the city of Omaha, party of the first part, with water for fire protection and public use for the term of twenty-five years from the time of the completion of said works, as fixed by said ordinances, Nos. 423 and 430, and by said report of J. D. Cook, as approved by said city council. Said party of the second

part further agrees to furnish said water through not less than
795 two hundred and fifty hydrants, of the character and as located and placed in said ordinances and approved report, at the rate of eighty-four (\$84) dollars per year per hydrant, and to furnish said water through such intermediate hydrants, in addition to the number first given, as may by the provisions of said ordinances and in accordance with said approved report be further called for or required, at the rate of ten (\$10) dollars per year per hydrant, and in case hydrants in addition to the number and quantity hereinbefore specified shall, during the said term of twenty-five years, be required on new mains, to erect, construct and maintain said new mains and furnish said water through said additional hydrants at the rate of sixty (\$60) dollars per hydrant.

And in consideration of the said agreements of the said Sidney E. Locke, the said party of the first part agrees to pay for said hydrant water supply at the rates per hydrant per year above specified. The said payment to be made by warrants drawn upon the 1st day of July and the 1st day of January of each and every year of said term upon the treasury of said city; and the payment for the water from each hydrant to commence when it is actually ready for use and the city clerk notified thereof, and the pay therefor shall cease

during the time that said hydrant shall be out of repair or unfit for use.

This contract shall take force and effect only upon its approval by the city council of the city of Omaha.

In testimony whereof we have hereunto set our hands at Omaha, Nebraska, the date first above written.

(Signed)

THE CITY OF OMAHA,
By C. S. CHASE, *Mayor*.
SIDNEY E. LOCKE.

Signed in the presence of

CHAS. F. MANDERSON.
C. J. WESTERDAHL.

Approved by the city council July 20, 1880.

(Signed)

JAMES E. BOYD,
Pres't City Council.

Attest:

[Seal of the City of Omaha.]

J. F. McCARTNEY,
City Clerk.

(On the margin of this appears in red ink "Exhibit D.")

Know all men by these presents:

796 That whereas, heretofore on the 20th day of July, 1880, one Sidney E. Locke, entered into a contract in writing with the city of Omaha, for the construction and maintenance of water works in the City of Omaha in pursuance of an ordinance No. 423, and an ordinance No. 430, and a report of J. D. Cook, engineer, and which said contract provides for the construction and maintenance of said water works on the part of the said Sidney E. Locke, in conformity to the terms of said contract and said ordinances, and secures to the said Locke, and his assigns, all benefits, profits and privileges in said contract and in said ordinances provided.

And whereas, heretofore afterwards, on the 26th day of July, 1880, the said Sidney E. Locke, did assign, transfer, and set over unto the City Water Works Company of Omaha, a corporation organized under the laws of the State of Nebraska, said contract and all the rights, privileges, profits, benefits secured to him, said Locke, by said contract, and which said assignment was filed in the office of the city clerk of said city of Omaha October 5th, 1880.

And whereas, afterwards, the said City Water Works Company of Omaha did proceed in conformity with the terms of said contract and said ordinances to construct and build the water works therein mentioned, and have since that time maintained and operated the same.

And whereas, the said City Water Works Company of Omaha the party of the first part in this instrument, has this day sold and conveyed its said water works plant and franchise to the American Water Works Company, a corporation organized under the laws of the state of Illinois, for a valuable consideration by the said The American

Water Works Company, party of the second part to this agreement, the receipt whereof is hereby confessed and acknowledged.

Now Therefore, in consideration of the premises and of the promise of the second party hereinafter contained, the said party of the first part doth sell, assign, transfer and set over unto the said party of the second part, its successors and assigns, the said contract between the said city of Omaha and said Sidney E. Locke, and all the rights, benefits, privileges, profits and franchises secured to him, said Locke, by the said contract and said ordinances, or which the said Locke or the said City Water Works Company at any time had under the said contract and ordinances by means of said contract.

To have and to Hold to the said party of the second part, its successors and assigns, absolutely, and the said party of the first
797 part doth hereby empower and authorize the party of the second part in its own name, or in the name of the first party to take, use, have, enjoy and possess all the rights, legal and equitable, for enforcing any of the rights, privileges, benefits, profits or franchises secured to the said Sidney E. Locke, or his assigns, by said contract and ordinance which the said first party now has or to which it has any claim or right as fully and to the same extent as the said first party might or could do had this instrument never been executed, but at the cost and expense of the second party, all claims, debts, dues or demands accruing under said contract after the date of this instrument belong to and to be the property of the said second party. Nothing in this instrument contained to affect any right of the first party to any claim, debt, dues or demands which have accrued up to or upon the date of this instrument.

And the said second party in consideration of said sale and assignment and transfer by the said first party, doth hereby agree to and doth assume all the obligations of the said Sidney E. Locke and of the said first party under said contract and ordinances mentioned in the same manner in all respects as the said Sidney E. Locke was bound to do under the terms of said contract and ordinances, it being the meaning and intent of this assignment to substitute in all things the said the American Water Works Company for and in the place of the City Water Works Company in respect to all matters and things pertaining to said contract after the 1st day of July, 1887.

In Witness Whereof, the said parties have caused these presents to be executed in duplicate by their respective presidents and secretaries, and their respective corporate seals to be hereunto in duplicate affixed this first day of July A. D. 1887.

[SEAL.]

CITY WATER WORKS COMPANY OF
OMAHA,

By W. A. UNDERWOOD, *President*.
S. L. WILEY, *Secretary*.

[SEAL.]

THE AMERICAN WATER WORKS
COMPANY,

By J. R. CUSTER, *President*.
JOS. A. GRIFFIN, *Secretary*."

(On the Margin of this appears in red Ink, "Exhibit E.")

At a session of the Circuit Court of the United States for the District of Nebraska, continued and held pursuant to adjournment, at the United States Court Room, in the City of Omaha, on the
 798 twenty-fourth day of June, 1895, the Honorable Elmer S. Dundy, and J. A. Riner, Judges, being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

96 Q.

THE FARMERS' LOAN & TRUST COMPANY

v.

THE AMERICAN WATER WORKS COMPANY, a Corporation Organized and Existing under the Laws of the State of Illinois; The American Water Works Company, a Corporation Organized and Existing under the Laws of the State of New Jersey; E. Hyde Rust, as Suspended Receiver of the said American Water Works Company of New Jersey, and Alonzo B. Hunt, Temporary Receiver of said Company.

Decree.

This cause having been set down to be heard on the 7th day of May last past, on that day E. Hyde Rust Receiver of the American Water Works Company of New Jersey called to the attention of the Court to his Motion for leave to file the joint and several answer of himself and of said company made on the 17th day of November, 1894.

Thereupon, it was ordered and decreed that the said Motion be and the same was overruled and denied, to which the said Rust then and there duly excepted. And thereupon the demurrer of the Farmers' Loan & Trust Company and the Receivers Bierbower and Hunt to the said cross-bill of said Rust, was argued by counsel and it was then and there ordered and adjudged that the same be sustained; to which the said Rust then and there excepted. And it is now here ordered, adjudged and decreed that the said cross-bill be and the same is hereby dismissed, with leave to allege the matters thereof upon the proceedings hereinafter provided for, touching the distribution of the proceeds arising from the sale of the premises hereinafter ordered and decreed. Thereupon the said Rust duly excepted to the said orders and decree, and prays an appeal to the Circuit Court of Appeals, which is hereby allowed upon the condition that he file a bond in the penal sum of \$1,000.00 for costs on such appeal. And thereupon on the day aforesaid, this cause came on to be heard upon the pleadings and proofs and the exhibits mentioned and referred to, in the pleadings, depositions and stipulations filed in this cause, and was argued by counsel.

And the Court finds that on the 20th day of July, 1892, the Court of Chancery of the state of New Jersey appointed E. Hyde Rust, Receiver in insolvency of the defendant the American Water Works Company, a corporation organized and existing under the laws of that state. That by an order of this Court bearing date
 799 the 23rd of September, 1892, the said Rust was recognized by this Court as such Receiver of said Company, and was

placed in charge of its property in this District hereinafter described. That by an order of this Court bearing date the 15th of July, 1893, the said Rust was suspended as such Receiver, and the defendant Alonzo B. Hunt was appointed temporary Receiver of said property, and in pursuance of said order, and on the day of its date, the said Hunt took and until the filing of the bill in this cause, held possession of said property, when he surrendered the same into the hands of Ellis L. Bierbower and Alonzo B. Hunt, who by order of this Court, bearing date on said day, were appointed receivers of said property.

This court further finds that the defendant the American Water Works Company a corporation organized and existing under the laws of the State of Illinois, made to the plaintiff two several mortgages in the bill described, and at the several times of their respective dates, and thereupon made and issued, and the plaintiff certified the bonds secured by said mortgages, the principal of which amounted to three millions six hundred thousand dollars (\$3,600,000.00), of which bonds, two million (\$2,000,000) drew interest at the rate of five per cent per annum, and one million six hundred thousand (\$1,600,000) drew interest at the rate of six per cent per annum, which interest was represented by coupons attached to the said bonds; that of the interest maturing on the 1st of January, 1892, coupons amounting to thirty-six thousand two hundred and seventy-five dollars (\$36,275.00) were not paid when they by their terms became due; of the interest maturing the 1st of July, coupons amounting to forty-seven thousand five hundred dollars (\$47,500.00) were not paid when the same became due; and of the interest maturing the 1st of January, 1892, coupons amounting to Twenty-two Thousand Five Hundred Dollars (\$22,500.00) were not paid, when by their terms they became due, all of said coupons still remain due and unpaid. Since the day last aforesaid, no interest has been paid upon the said bonds, although all of them were long before that day, outstanding, the plaintiff having in pursuance of the stipulations of said mortgage declared the whole mortgage debt due, the court finds that for principal and interest, there is due upon the bonds aforementioned, and the coupons thereto attached, four million, one hundred and fifty-nine thousand and fifty-four dollars (\$4,159,054.18) and eighteen cents.

It is therefore ordered, adjudged and decreed as follows:

800 1. That the defendants the American Water Works Company of Illinois and the American Water Works Company of New Jersey, either or both of them pay into the registry of this court, the said sum of four million, one hundred and fifty-nine thousand, fifty-four dollars and eighteen cents (\$4,159,054.18) so as aforesaid found due to the plaintiff upon the mortgage debt above mentioned with interest from this day to the day of payment within two months from the date of this decree; and in default of so doing, that all and singular the mortgage premises mentioned in the bill of complaint in this cause, and hereinafter described, be sold at public auction by and under the direction of one of the masters of this court; that said sale be made at the north door of the federal court house in the City

of Omaha; that the said master give public notice of the time and place of such sale, according to the course and practice of this court; that any person or party bidding at such sale, and to whom the said master may strike the premises off, shall at once pay to said master the sum of fifty thousand dollars (\$50,000.00) upon his bid; but should any person or party bidding at such sale to whom the premises may be struck off, neglect or fail pending said sale to pay to said master the said sum, the said master shall at once again offer the premises for sale, and proceed as if such bid had not been made; any party to this suit may become a purchaser at such sale; a majority in amount of the holders of the said bonds, shall have the right by written instrument under the hands of such majority, to fix the sum which it shall be the duty of the plaintiff to bid for said premises on their behalf and for their benefit; but such majority joining in the said request to the said plaintiff, shall make provision to its satisfaction for the payment in cash of all expenses incurred in the execution of the trust declared in the two mortgages, copies of which are attached to the bill, and the proportion of such sum as may be payable to bondholders not joining in the said request. If in pursuance of such request the plaintiff be the purchaser at said sale, it shall hold the property so purchased upon trust for the equal benefit of the bondholders, who shall have required it to buy in the property in their behalf, as their absolute property; all bids save that of the plaintiff shall be payable in gold coin of the United States of present standard of fineness; but the plaintiff may answer its bid by bonds and coupons hereinbefore mentioned, provided, however, that such bid be in pursuance of a request of a majority of the bondholders, as hereinbefore provided; and provided further that the plaintiff shall answer its bid by bonds and coupons, only to the extent of the holding of the bondholders who shall in manner aforesaid, have requested him to buy in the premises for them; the remaining

801 part of the plaintiff's said bid, shall be paid in gold coin of the United States, of present standard of fineness.

It is further ordered, that the master report his proceedings in the execution of this decree, with all convenient speed, particularly stating his expenses, fees, disbursements and commissions, on account of such sale; that he deposit in the registry of the court, all money which may be paid to him upon and on account of said sale; and of the filing of his said report, he shall give due notice to each party to this suit.

The defendants shall not be entitled to an extension of the time for paying the mortgage debt, beyond the day in that behalf above limited, except by special order of the Court.

II. That the defendants and all persons claiming or to claim from or under them or either of them and all persons having a lien subsequent to said mortgages, by judgment, decree or otherwise, upon the lands and property hereinafter described be forever barred and foreclosed of and from all equity of redemption and claim of, in or to said mortgage-premises, and every part thereof.

III. Within 60 days from the date of this decree, each holder of the bonds and coupons in the pleadings mentioned, shall file the

same with the Clerk of this Court, together with a memorandum of his name, and the amount claimed by him upon the bonds and coupons so filed by him; that at the expiration of said term of 60 days, the matter stand referred to the said master to compute, ascertain and report to the Court, what is due to each holder of said bonds and coupons and the proportion of the proceeds of said sale, to which upon distribution thereof, he shall be entitled; that upon such reference, said master shall hear any party presenting any bonds or coupons in support of his right to share in the distribution of the proceeds of said sale, and against the right of any other party thereto; that after due notice, any holder of outstanding bonds failing to present the same before said sale, shall not share in said proceeds except by special order of the Court; the terms of which notice if there be occasion therefor, shall be prescribed by an order supplemental hereto. Holders of bonds who shall request the plaintiff to bid in the premises in trust for them as above provided, shall before the sale give notice to the master that they have joined in such request; and any person failing to do so, shall not be considered as making such request or entitled to the benefit of the purchase by the plaintiff, except to the extent of the pro rata share of 802 the purchase price, ascertained to be going to him, and to which he shall be entitled in cash.

IV. The proceeds arising on said sale, shall be applied as follows:

1. So much of the said proceeds as are necessary for the purpose shall be applied to pay the expenses, disbursements, fees, cost and commissions of the master upon the said sale.

2. Thereafter, what shall remain so far as necessary shall be applied to pay the taxable costs of the several officers of the court.

3. Thereafter, and so far as may be necessary shall be applied to pay the plaintiff its costs, expenses, disbursements, fees and commissions as provided in said mortgage; the amount to be hereafter ascertained and determined by the order of the court.

4. What shall remain of the said proceeds after the items above mentioned have been paid, shall be applied to the payment in full of coupons which matured prior to the date of this decree, together with interest thereon. Each holder of such coupons shall be entitled to what shall be found due by the court to him as hereinbefore provided, but all holders of coupons who shall join in a request to the plaintiff to bid in the property in trust for them, shall not be entitled to be paid in money, but shall in lieu thereof, accept a certificate of the clerk showing their respective interests in the property purchased by the plaintiff.

5. What shall remain of the said proceeds, shall thereafter be distributed and paid to the holders of the bonds as their respective interests shall be ascertained and determined as hereinbefore provided; but such of said bondholders as shall join in a request to the plaintiff to bid in the said property for them, shall not be paid in money, but in lieu thereof, shall take and receive in satisfaction of what shall be coming to them respectively, a certificate of the clerk showing their interests in the plaintiff's purchase as the same shall have been ascertained and declared by the court.

The foregoing provisions for the application of the proceeds of said sale, shall be subject to such order or orders, as the court may hereafter make, for the payment out of the proceeds of said sale, or the moneys which may be realized from the operation of said water works, up to the time of the confirmation of sale, of just

charges against the said trust and the court reserves the several petitions of Charles Offutt and others now on file, or which may hereafter be filed, of all parties claiming a lien upon or right to be paid out of the said moneys, and the determination of such petitions; and so much of the said funds as are necessary for the purpose, shall be retained in the hands of the Receivers, to answer the orders of the court upon the said petitions until by special order in that behalf, the said funds are discharged. And leave is granted to the said Rust to file his petition in respect to the matters alleged by him in his aforesaid cross bill, such his petition to be disposed of as other like petitions above referred to.

V. Ellis L. Bierbower and Alonzo B. Hunt having been appointed receivers of the aforementioned property, by order of this court made at the filing of the bill in this cause, and having received the property from the said Hunt who before that time held the same as temporary receiver under an order of this court, the pending receivership shall not be disturbed by or under this decree, until the confirmation of the sale hereinbefore provided for; but the money in their hands or which shall come to their hands in the course of the administration of their said trust, shall be applied as the court may hereafter in that behalf direct; and the administration of the trust estate, shall be continued by the receivers, as heretofore under the order of the court. Upon the confirmation of said sale and the execution of the purchaser of a deed to the property hereinbefore referred —, the said receivers shall deliver possession to such purchaser.

VI. That the purchaser of said premises at such sale be let into possession thereof, and that any of the parties in this cause who may be in possession of said premises or any part thereof, and any person who since the commencement of this suit has come into possession under them or either of them, deliver possession thereof to such purchaser on the production of the master's deed for said premises, and a certified copy of the order confirming his report of sale. That upon the confirmation of said sale, the said master make to the purchaser his deed in due form, conveying the said mortgage-premises and property to him; and that if the moneys arising from said sale be insufficient to pay the amount found due to the plaintiff with interest and costs and expenses of sale as aforesaid, that said master specify the amount of such deficiency in his said report. All other questions are reserved to be hereafter considered by the court, and any party to this suit may apply to the court upon the foot of this decree.

VII. The premises and property authorized to be sold under this decree are known and described as follows:

804 All those several pieces and parcels of land known and described as follows:

That certain piece or parcel of land described as follows: Begin-

ning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas County, Nebraska, and running thence westerly along the south line of said Bridge Street, to the east line of Fifth Street in said city, thence southerly along the east line of said Fifth Street, to the right of way of the Chicago, St. Paul & Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street, in said city; thence easterly along the south line of said State Street to the east line of said railroad right of way; south of State Street; thence southerly along said right of way line to the north line of Washington Street in said City; thence easterly along the north line of said Washington Street to the east line of said Mill Street to the northwest corner of block two hundred and fifty-eight (258) in said city; thence easterly along the north line of said block two hundred and fifty-eight (258) to its intersection with the west — of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings to the place of beginning.

Also that other piece or parcel of land in said City of Florence known and described as blocks number- two (2) one hundred and twenty-six (126) and two hundred and sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also those parts of Adams, Farnam and Sheffield Streets heretofore vacated in said City of Florence, lying between the west line of Water Street, and the east line of Mill Street in said city.

Also that other piece or parcel of land known and described as the north fifty (50) feet of Lot Eighteen and the west ten (10) feet of the north fifty (50) feet of Lot Seventeen (17) both in Block Two (2) of Armstrong's Addition to the City of Omaha, according to the plat of said Addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also that other parcel of land known as Lot B in Reservoir Addition to the said city of Omaha, according to the plat of said Addition recorded in the office of the Registrar of Deeds of said County.

Also those other parcels of land known as Lots one (1) Two (2) Three (3) Four (4) Five (5) Six (6) Seven (7) and Eight (8) in Block Q, and lots One (1) Two (2), Five (5) and Six (6) in Block Three Hundred and Twenty-eight (328) in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also that certain other parcel of land in said City of Omaha described as follows:

Beginning at a point on the south line of Burt Street at the northeast corner of Block Three Hundred and Sixty (360) in said city; thence north to a point corresponding with the south line of the alley in Blocks Three Hundred and Twenty-eight (328) and Three Hundred and Twenty-nine (329) in said city; thence east to the bank of the Missouri River at low water mark; thence in a southerly direction along the bank of the said Missouri River to a point correspond-

ing with the south line of Burt Street, produced east from its present termination; thence west to the place of beginning.

Also those two other pieces or parcels of land described as follows: Lots Seven (7) and Ten (10) in Block Seventeen (17) of Kountz's and Ruth's Addition to the City of Omaha, according to a plat of said Addition recorded in the said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one half of the northwest one-quarter of section seven (7) in township fifteen (15) north of Range Thirteen (13) east of the Sixth Principal Meridian. And all other land in the county of Douglas and State of Nebraska and all the right, title and interest therein, whereof the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, defendants in this suit, or either of them is seized.

Also all the rights, interest, title, claims and demands of every name and nature which have in any wise come to the American Water Works Company of Illinois, and the American Water Works Company of New Jersey, or either of them, in any wise whatever arising under a certain ordinance of the City of Omaha, known as Ordinance 423, entitled "An Ordinance to authorize and procure the construction and maintenance of water works in the city of Omaha, State of Nebraska, "passed by the city council of said city, and approved by the Mayor thereof, on the 11th day of June, 1880, and all **other Ordinances** of said city, amendatory thereof and supplementary thereto, also under a certain contract bearing date the 20th of July 1880 between the City of Omaha, party of the first part, and Sidney E. Locke, party of the second part, the right of the said

Locke under which contract had come to the Water Works
 806 Company of Illinois before the making of its mortgage to the Farmers' Loan & Trust Company of date the 1st of July, 1887, also the rights of said American Water Works Company under an ordinance of the Mayor and Council of the city of South Omaha, known as Ordinance Number 29, entitled "An Ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the city of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen years," passed by the Mayor and Council of said city of South Omaha, and approved by the Mayor of said city on the 17th of October, 1887. Also all rights of said company under an ordinance of the City of Florence, entitled "An ordinance to procure a supply of water for the City of Florence and its inhabitants for fire and domestic purposes, and to contract with the American Water Works Company therefor, passed by the Mayor and Council of said city of Florence, and approved by the Mayor of said city on the 13th of August, 1889, and the contract in pursuance thereof between said City and said company. And also, all and singular the pipes, mains, valves, hydrants and other apparatus now lying and being in the streets, alleys and public places of the cities of Omaha, South Omaha and Florence, or in any territory adjoining either of said cities or elsewhere in the county of Douglas in the State of Nebraska, and all the

right, title and interest which has at any time heretofore been vested in, or held and enjoyed by the American Water Works Company of Illinois, and the American Water Works Company of New Jersey or either of them, under and by virtue of the several ordinances and contracts each and every of them hereinbefore mentioned, or in any other wise, acquired, held or enjoined by either of said companies; and all machinery, pumps, boilers and engines, tools, material on hand, personal property and assets, of either of said water companies and also all water rents from private consumers wherever situate, and all debts, dues, rentals, claims and demands of every name and nature however arising, of either of said companies against the city of Omaha, the city of South Omaha, and the city of Florence, any or either of them, whether such debts, dues, demands, rentals and claims, have heretofore accrued and are now existing, or may at any time hereafter accrue to said companies or either of them. Together with all moneys, now in the hands of the receivers of said Water Company or the registry of this Court, or which may hereafter come to the hands of the said receivers, or come into the registry of this Court, subject, nevertheless to such orders in respect thereof, as this

807 Court may have heretofore made or may hereinafter make, in respect of said moneys, as in this decree provided. It being the purpose and intent of the court that by the sale hereinbefore provided for, the entire plant and system of water works of the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them in the County of Douglas and State of Nebraska, and all the right to maintain and operate the same, and any and every part thereof and all interest, debts, demands and moneys which may arise out of or come from the operation of said works, shall be sold and shall pass to and become invested in the purchaser at the sale hereinbefore provided for.

The bond of the said companies or either of them which may prosecute such appeal, shall, in order to operate as a supersedeas, be in the penal sum of \$4,500,000.00. But the bond of the said companies or such one of them as shall prosecute its said appeal shall be in the penal sum of \$2,000.00 for costs, but not to operate as a supersedeas.

Thereupon the defendants excepted to all and every the provisions of this decree.

(Signed)

JOHN A. RINER, *Judge.*

THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify that the above and foregoing is a true copy of an order entered upon the Journal of the proceedings of said court, in the cause therein entitled; that I have compared the same with the original entry of said order and it is a true transcript therefrom, and of the whole thereof.

Witness my official signature, and the Seal of said Court, at Omaha, in said District, this eleventh day of July, A. D. 1896.

[Seal U. S. Circuit Court, Dist. of Nebraska.]

ELMER D. FRANK, *Clerk*,
By R. R. BITTINGER, *Deputy*.

(Endorsed upon the back appears the following:)

In the Circuit Court of the United States for the District of Nebraska, City of Omaha, Complainant vs. Farmers' Loan & Trust Company, et al., Defendant. Amended and Supplemental Petition, Filed July 13, 1896, Elmer D. Frank, Clerk. W. J. Connell, Att'y for Complainant.

End of Exhibit 1, C. W. P.

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COPY OF EXHIBIT 2, C. W. P.

In the Circuit Court of the United States, District of Nebraska.

The Separate Answer of the Omaha Water Company, One of the Defendants, to the Amended and Supplemental Bill of Complaint and the Amendment Thereto of the City of Omaha.

This defendant, now and at all times hereafter reserving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint for answer thereto, or to so much thereof as this defendant is advised is material or necessary for it to make answer unto, answering saith:

I. Answering the allegations of paragraph 4 of said bill this answering defendant alleges that the said paragraph does not set forth completely and correctly the Ordinance No. 423, therein referred to. On the contrary, this defendant alleges that said ordinance provided, in section 1 thereof, that the person, company, corporation or association who should erect, construct and maintain water works upon the principles of a system and with a capacity in the manner therein described, should have the rights therein mentioned during the time any such person, company, corporation or association, or their assigns, should maintain and operate any such water works and while constructing the same. And this defendant, being so advised, denies that said franchise mentioned in said ordinance was not assignable without the authority and consent of said city, or that the powers and functions therein delegated could not be redelegated by the original grantee to a third person without the like municipal authority or consent. On the contrary, this defendant, being so advised, alleges that by the terms of the aforesaid statute under which the said city of Omaha was authorized to pass said ordinance, and by the terms of the said ordinance itself, the said franchise and rights conferred by said ordinance were assignable.

II. This defendant, answering the allegations of paragraph 7 of said bill, denies that the contract in said paragraph mentioned was

not assignable without the authority or consent of the said city of Omaha.

III. This defendant, being so advised, denies each and every allegation of paragraph 10 of said bill.

IV. This defendant, being so advised, denies each and every allegation of paragraph 13 of said bill.

809 V. This defendant, being so advised, denies the allegations of paragraph 14 of said bill, that the said contract and the said franchises were not assignable without the express authority and consent of the said city thereunto.

VI. Answering the allegations of paragraph 15 of said bill, this defendant alleges that if said ordinance, or any of the ordinances mentioned in said bill of complaint, contain or contained any terms, conditions or restrictions limiting the right of assigning said franchises and rights granted thereunder (which fact is disputed and denied by this defendant), or if any such terms, conditions, and restrictions arose out of the public nature of the duty assumed by said water works company (which fact is also denied by this defendant), this defendant alleges that nevertheless such terms, conditions and restrictions have been waived, changed and modified by the said city of Omaha and have not been preserved in full force and effect, but on the contrary, the said City of Omaha, by its dealings with the original contractor, with the City Water Works Company, with the American Water Works Company of New Jersey, by allowing each of said persons and corporation to exercise said franchises without objection, by permitting extensions of said water works to be built, by paying the hydrant rentals required to be paid by the contract entered into, and in other ways recognizing the validity of the assignments of said franchises by said various persons, firms and corporations without objection, and by reason of the fact that said City has never until the commencement of the present suit in any manner or form objected to such assignments or claimed that such assignments were invalid, thereby induced innocent purchasers in good faith to invest in the bonds secured by the mortgages made by the American Water Works Company of Illinois, said City and its officers having full knowledge of the execution of said mortgages and the issuance of said bonds, the money realized from said bonds having been used in the acquisition of other property and the construction of extensions to said works, the results of which have all been accepted by the said City of Omaha—in view of all these facts, this defendant is advised and alleges that, had terms, conditions or restrictions existed in any way restraining the assignability of said contracts, rights and franchises, the said City of Omaha has consented to such assignability and has estopped itself to deny the assignability thereof and cannot now claim that said contracts, rights and franchises are not or were not assignable.

VII. This defendant, being so advised, further denies each and every of the allegations of paragraph 16 of said bill.

810 VIII. Answering the allegations of paragraph 17 of said bill, this defendant admits that for more than a year preceding the filing of the bill herein the said water works have been main-

tained and operated by receivers appointed by this Honorable Court; but it denies that by reason of any of the matters or things alleged in said paragraph the rights, privileges and franchises granted and conferred by said ordinance No. 423 have or that any of them has been fully terminated, or terminated at all, or that, by virtue of the facts set forth in the said paragraph, the said contract is at an end. And this defendant, being so advised, alleges that until the appointment of receivers by this Court the terms and conditions of said contract were fully carried out by the said American Water Works Company (of Illinois) and the American Water Works Company (of New Jersey), to which said works and said contract and franchise had been conveyed and assigned long prior to the appointment of said receivers.

IX. Answering the allegations of paragraph 18 of said bill, this defendant, being so advised, denies that the right of the water works company therein mentioned was made dependent upon the time said company should maintain and operate said system of water works, or that said rights has become forfeited or terminated, either by the failure of the American Water Works Company to maintain and operate its said water works plant or in any other way.

X. Answering the allegations of paragraph 19, defendant denies that the American Water Works Company failed to comply with the provisions of said ordinance or said contract, or failed to maintain and operate said water works plant, and alleges that when said water works plant passed out of the control of said American Water Works Company (of New Jersey), it was placed in charge of receivers appointed by this Court, who have in all respects carried out the terms of said contract with said city; and this defendant denies that by reason of any of the matters and things alleged in said paragraph 19, all the rights, privileges and immunities granted or acquired by the American Water Works Company by the said ordinance, contract and assignment, or either of them, have become forfeited, and denies that the said city of Omaha has thereby or in any way become vested with the ownership thereof or is entitled to take possession, control or management of the said water works plant or property appertaining thereto or connected therewith, and denies that said City of Omaha has any right to take possession or control of said water works plant, or of any of the property connected therewith or appertaining thereto.

811 XI. As to the allegations of paragraph 20 of said bill, that for several years last past, by reason of the addition of new mains and new hydrants, as provided for in said contract, the pressure of water at said hydrants has been wholly insufficient to furnish the fire protection and to perform the tests in said paragraph mentioned, as has been at all times well known and repeatedly brought to the notice of all parties operating and maintaining said works, this defendant alleges that it is not informed as to the truth of each and every of said allegation- save by said bill, and leaves the complainant to make such proof thereof as it may be advised. But this defendant, being advised, alleges that during all the times mentioned the City of Omaha has used the water furnished to it under said contract and

has paid for the same, and by its conduct, if it had any reason of complaint it has waived the same and is now estopped to allege the same against this defendant; and this defendant, on information and belief, denies that the franchise granted by the City of Omaha, mentioned in said paragraph 20, has become forfeited.

XII. Answering the allegations of paragraph 22 of said bill, this defendant being advised by counsel, denies that the property therein mentioned could not lawfully be mortgaged by said American Water Works Company without the authority or consent thereto of the said complainant.

XIII. This defendant denies the allegations of paragraph 23 of said bill, that the City of Omaha has not consented to the making of the said mortgages or either of them, nor in any manner nor at any time ratified or sanctioned the said mortgages or either of them.

XIV. This defendant, being so advised, denies each and every of the allegations of paragraph 24 of said bill; and on the contrary this defendant alleges that the said mortgages therein mentioned were made and the bonds secured thereby were negotiated and sold for the express purpose of enabling said American Water Works Company to carry out its contract with the said City of Omaha and to enable it to acquire property and obtain facilities for supplying the said city and the inhabitants thereof with pure and wholesome water, and that the proceeds of the bonds so negotiated were actually used for the purposes mentioned.

XV. This defendant, being so advised, by counsel denies each and every of the allegation- of paragraph 25 of said bill.

XVI. Answering the allegations of paragraph 26 of said bill, this defendant alleges, as it has heretofore alleged, that if there
812 were any terms, conditions or limitations restricting the right of assignment of said contract and franchise, and with reference to the provisions relating to forfeiture contained in Section 11 of said ordinance, the City of Omaha has waived its right to object to such assignment or to the enforcement of any forfeiture, and is estopped to allege the same; and this defendant denies that there are any such terms, conditions or limitations in said ordinance, restricting the assignability of said franchise and contract, and denies that any right of forfeiture has accrued to the City of Omaha.

XVII. Answering the allegations of paragraph 27, of said bill, this defendant, being so advised, denies that said mortgages or either of them was null or void for either of the reasons set forth in said paragraph of said bill or for any other reason.

XVIII. Answering the allegations of paragraph 28 of said bill, this defendant, being so advised by counsel, denies that the scheme of consolidation and amalgamation therein set forth *are* in any way in violation of the contract with the City of Omaha, and alleges that any act done by the American Water Works Company, as therein mentioned, can have no effect upon the rights of this defendant as trustee under the mortgages made by said American Water Works Company or the holders of bonds secured thereby. This defendant further alleges that the said City of Omaha has, by its acts and conduct hereinbefore mentioned, consented to, ratified and approved the

said transfer of the said property and franchises to the said New Jersey corporation.

XIX. This defendant, being so advised by counsel, denies each and every of the allegations of paragraph 29 of said bill.

XX. Answering the allegations of paragraphs 30 and 31 of said bill, this defendant is informed that in a certain action brought by the United Water Works Company, Limited, in the Circuit Court of the United States for the District of Nebraska, against the American Water Works Company of Illinois and the American Water Works Company of New Jersey, a decree was entered setting aside the transfer of the Omaha property to the New Jersey corporation. The defendant is not informed save by said bill as to the truth of each and every of the allegations of said paragraph respecting the proceedings in said cause, or as to whether proofs were taken, and that upon full consideration the said decree was entered, and leaves the complainant to make such proof of said allegation as it may be advised. On the contrary, this defendant is advised and there-

813 fore alleges that the corporations which were parties to said suit were all of them controlled by the same person or persons and that said decree was entered, actually if not in form, by consent that this defendant was not a party to said suit, and is not bound by any of the proceedings taken therein.

XXI. This defendant is not informed save by said bill as to the truth of the allegations of paragraph 32 of said bill, that by reason of the premises last above recited said New Jersey corporation had (at the time of the filing of said bill) no interest whatever in the property of the water works plant, and leaves the complainant to make such proof thereof as it may be advised; but this defendant denies that the operation of said water works by the receivers of this court was and is a violation or in contravention of the obligations of the defendant, the American Water Works Company, to the complainant, or that they constitute a failure on the part of said American Water Works Company to comply with the terms of the franchises granted by the City of Omaha, or that such operation by said receivers brings the terms of said franchises and said contract to an end.

XXI. (a) Answering the allegations of paragraph 34 of said bill, this defendant alleges that subsequently to the filing of said bill, and on or about the 8th day of August, 1896, by order of this Court, the receivers therein mentioned delivered over possession and control of said property and franchises to this defendant, and this defendant in turn conveyed and transferred the same to the Omaha Water Company.

XXII. Answering the allegations of paragraph 36 of said bill this defendant admits that the complainant herein was not a party to the foreclosure proceedings therein mentioned, and alleges that it was not a necessary or proper party thereto; but, being advised by counsel, alleges that it is bound by what was determined in said suit.

XXIII. This defendant, being so advised by counsel, denies the allegations of paragraph 37 of said bill, that this Court assigned

as its reason for denying the motion for a preliminary injunction made by the complainant that the purchasers at the sale in the foreclosure suit would take nothing thereby as against said complainant.

XXIV. Answering the allegations of paragraph 38 of said bill, this defendant denies that no part of the price bid for the property at the sale was paid at the time of the filing of the bill herein; but

on the contrary, this defendant alleges that it paid to the
814 Master making the sale, at the time of the sale, fifty thousand dollars on account of the purchase price; and further answering alleges that on the 16th day of January, 1896, this defendant completed the payment of the purchase price of said premises and received from the Master, under an order of the Court duly made in that behalf, a deed to all the mortgaged property, premises and franchises, and that subsequently thereto and on or about the 8th day of August, 1896, pursuant to an order of this Court, the said property was turned over to this defendant, and by it in turn turned over to the Omaha Water Company, to whom this defendant had on or about the 23rd day of July, 1896, executed a deed of conveyance of said property, premises and franchises. The said Omaha Water Company, to whom such transfer was made, is a corporation organized and existing under the laws of the State of Maine, and was organized by the bondholders at whose request and in whose behalf this defendant had purchased the property at said foreclosure sale, and said Omaha Water Company is now the owner of said property, premises and franchises and is in the actual possession and operation thereof.

XXV. This defendant, being so advised by counsel, denies each and every of the allegations of paragraph 39 of said bill.

XXVI. Answering the allegations of paragraph 40 of said bill, this defendant does claim that the property and rights therein mentioned have passed to its grantee, the Omaha Water Company, and denies that the claims are false and contrary to the just and equitable rights of the complainant.

XXVII. Answering the allegations of paragraph 41 of said bill, this defendant alleges that, as it is advised and believes, while in its individual capacity it might have no power to maintain and operate a water works plant, it has, as trustee, whatever powers may be necessary in order to enable it to perform its duties as such trustee, and as such has power to maintain and operate a water works plant.

XXVIII. Answering the allegations of paragraph 42 of said bill, this defendant, being so advised, denies that any plan of the Bondholders' Committee therein mentioned is in any respect unlawful.

XXIX. Answering the allegations of paragraph 43 of said bill, this defendant denies the allegation therein made that neither this defendant nor any other company, corporation, association, person or persons except the defendant, the American Water Works Company, has any franchise, right or authority whatsoever derived
815 the said franchise or to perform said contract or to operate and maintain the said water works plant; and it denies that any

act or acts of this defendant or its grantee is or are unjust or inequitable or contrary to the mandates of public policy and the law.

XXX. Answering the allegations of paragraph 44 of said bill, this defendant alleges that the said judicial sale is not invalid.

XXXI. This defendant denies the allegations of paragraph 45, that the person or persons who have become interested in the property will be interested adversely to the City of Omaha or that vexatious or burdensome litigations will follow, or that the new mortgage or new stock will create a cloud upon the title of complainant to said property, rights, privileges and franchises. This defendant denies that complainant has any title to said property, rights, privileges or franchises.

XXXII. Answering the allegations of paragraph 46 of said bill, this defendant alleges that the property, premises and franchises purchased at the foreclosure sale had been conveyed by it to the Omaha Water Company, as aforesaid, and that the new mortgages had been executed by the said Omaha Water Company.

XXXIII. Answering the allegations of paragraph 47 of said bill this defendant alleges that if the position of the complainant as therein stated, were well taken and receivers were appointed to operate said plant—the Court, in the appointment of said receivers would be performing an act which, in the earlier part of the said Bill of complaint, this complainant has already alleged was improper, invalidated the franchise granted by the City of Omaha; but this defendant, being so advised by counsel, denies that the remedy of said bondholders was confined to a sequestration of the earnings of said plant.

XXXIV. This defendant denies each and every of the allegations of paragraph 48 of said bill.

XXXV. This defendant denies the allegations of paragraph 49 of said bill, that the encumbrances which have been placed upon said property are in any way unlawful or create a cloud thereon against the rights of the complainant therein.

XXXVI. This defendant denies the allegations of paragraph 50 of said bill, that any necessity exists for the appointment of receivers herein, and denies that the complainant has in and by its said bill made out a case which entitles it to the appointment of a receiver or receivers of the said mortgaged property, premises and franchises.

816 XXXVII. This defendant denies the allegations of paragraph 51 of said bill, that the Farmers' Loan & Trust Company as the purchaser at said sale, is not entitled to take and receive the said hydrant rental, and that it has acquired no right or interest thereto, or in the said water works company by or under said purchase at said judicial sale. On the contrary, this defendant alleges that its grantee, the Omaha Water Company, has the right to collect said hydrant rental.

XXXIX. A. Answering the allegations of paragraph 52 of said bill, this defendant denies that the City of Omaha has any right to declare a forfeiture of the said contract or franchise, or that the City of Omaha has any right to take possession of said water works plant,

and it denies that said City of Omaha has the right to insist upon the — or company as alleged in paragraph 53 of said bill; and it denies that the City of Omaha has the right to insist upon the forfeiture of the said franchise, or that it has any right to take possession of said water works property as alleged in paragraph 54 of said bill.

XXXIX. B. Answering paragraphs 53, 54, 55 and 56 of said bill this defendant says, that the said complainant, the City of Omaha, has from time to time since the year 1893, paid hydrant rental to the said Receivers in the suit brought by this complainant and in complainant's bill set out, and did from time to time in the usual and ordinary course of business recognize the said contracts as existing and in force between the said city and the said Receivers acting for the various interests represented in said suit, and that on or about the — day of — 18—, the said City of Omaha refused to pay its hydrant rental on the ground that proper and adequate water service under the terms of said contract was not being had at the hands of the Receivers acting for the Company and for the persons represented in said suit, and that thereupon said Receivers filed in said Court their petition against the said City of Omaha, asking that it show cause why it should not pay said hydrant rental and comply with its contract, to which said application of the said Receivers said City of Omaha filed its showing of cause and appeared in said case to make the same, and that while said proceedings were pending an agreement was had between the said City of Omaha and the said Receivers acting for the said complainant trustee, and the other parties represented by them, by which the said Receivers were to make such improvements and were to lay certain pipe lines and make certain additions to the plant in the City of Omaha as to afford better service, and by agreement between the City of Omaha and the said Receivers the nature and extent of such changes was laid out and agreed upon, and that upon the Receivers making such changes and additions the said City of Omaha would pay to said Receivers said hydrant rentals which had been withheld, and this defendant shows that in pursuance to said agreement between said City and said Receivers the said Receivers made said changes, and the said Receivers expended a large sum of money in making such changes and additions to the same, and the same were accepted by the City of Omaha as a full rectification of any defects then existing in the water supply, and were received by the said City of Omaha as a full compliance with its terms, and thereupon the said City of Omaha paid to the said Receivers the hydrant rental, and continued to pay the same down to the filing of this bill, and thereupon and upon the payment of such hydrant rentals and agreement of parties with respect thereto, as hereinbefore set out, the said application of said receivers was discontinued, to all of which proceedings in said Circuit Court of the United States this defendant makes reference, and prays that the same may be taken as part of the answer in this case so far as the same may appear of record in the said Circuit Court of the United States and in the proceedings therein, and as to the matters

in this paragraph set out not appearing of record the defendant will make due proof thereof.

And defendant shows to the Court that by reason of said proceedings and by reason of such compromise and settlement and the money expended by said Receivers and the payments thereunder, the said complainant is estopped to deny the right of this Trustee on the validity of the mortgages or the forfeiture of the franchise of said Company, and bought not in equity or good conscience to be allowed to plead or assert such forfeiture on the invalidity of the mortgage of this defendant Trustee, or that the contract of said Company was terminated or forfeited.

XL. This defendant, further answering, alleges that under the terms of the ordinance of the city of Omaha under which said water works was constructed, and the terms of the contract with Locke set forth in the bill of complaint herein, the said franchise granted by the said City of Omaha to the said Locke and said contract were assignable by their terms, and that the City of Omaha has permitted mortgages to be made on said property and franchises, has paid the

hydrant rentals to the various persons and corporations in
818 control of said water works from time to time, has allowed extensions and improvements to be made to said water works and for that purpose has suffered the streets of said city to be dug up has accepted the benefits of the proceeds of the bonds secured by the mortgages made to this defendant which were used in said work of extension and improvement, and has failed to object to the making of said mortgages and the execution of said bonds, of all which the officers of said City were informed about the time of their execution the said bonds became the property of bona fide holders for value without notice. By reason of all these matters and things, the said City of Omaha is estopped to allege that the said franchise and contracts were not assignable, and it cannot in equity and good conscience be allowed to interpose any such defense as against this defendant or its grantee.

XLI. This defendant further answering says that the said decree was placed in the hands of Elmer S. Dundy, Junior, one of the Masters of this Court to be executed and that under and in pursuance of the direction of the said decree the said Master sold the said premises upon due proceedings in that behalf to the Farmers' Loan and Trust Company, one of the defendants herein. That afterwards and on the — day of — this Honorable Court made its order confirming said sale and the report of said Master and directing him to convey the mortgaged premises and all thereof to the said Farmers' Loan & Trust Company. That on the 16th day of July, 1896 the said Master made, executed and delivered to the said company his Master's Deed in due form of law whereby he the said Master conveyed to the said Trust Company the said mortgaged premises and all thereof and thereupon by virtue of the said deed and the order of said court, the said company entered into and took possession of the said premises and all thereof and thereupon made to this defendant the Omaha Water Company its deed duly executed and in due form of law, whereby it conveyed to this defendant all the said

mortgaged premises and on the 5th day of August 1896 this defendant took possession of the said premises and began and ever since has continued to operate the said plant and works?

XLII. At divers times since the day last aforesaid the said city of Omaha has recognized this defendant as the owner of the said property and as being duly vested with all the rights, powers and privileges originally vested in the aforesaid Locke under and by virtue of the ordinances of the said city and the contract of the said city with him, and in the said bill referred to and which have at any time come to and been vested in the aforesaid City Water Works Company, the American Water Works Company of Illinois, the American Water Works Company of New Jersey, and the Farmers' Loan & Trust Company; that the said city has at divers times paid to this defendant large sums of money for water delivered to it as the owner of said plant and works and has also at divers times authorized this defendant to open streets in said city for the purpose of repairing the pipes of said water works laid in said streets through which this defendant has conducted water for delivery to the said city and the inhabitants thereof.

And this defendant submits to this Honorable Court that all and every of the matters in the said amended and supplemental bill and the amendment thereof mentioned and complained of are matters with respect to which the said plaintiff is not entitled to any relief from this Honorable Court. And this defendant hopes that it will have the same benefit of this defense as if it had demurred to the said bill and this defendant denies all unlawful combination and confederacy in the said bill charged; without that, any other matter or thing necessary for it to make answer unto and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays to be hence dismissed with its reasonable costs and charges in that behalf most wrongfully sustained.

THE OMAHA WATER COMPANY,

By E. L. BIERBOWER, *Its General Manager.*

[The Omaha Water Company, Incorporated 1896, State of Maine.]

HOWARD MANSFIELD,

R. S. HALL,

Solicitors for Omaha Water Company.

J. M. WOOLWORTH,

Of Counsel.

DISTRICT OF NEBRASKA, ss:

Ellis L. Bierbower being duly sworn says he is the General Manager of the defendant in the foregoing answer and its chief executive officer in the State of Nebraska. That he has personal knowledge of all and every the matters and things alleged, averred, confessed or denied in the said answer and that all and every the matters and

things aforesaid are true as in the said answer alleged of his own knowledge. And that the seal of the defendant in the said
 820 answer above affixed thereto is the seal of the said defendant and has been affixed to the said answer by its authority.

E. L. BIERBOWER.

Subscribed and sworn to before me, this 30th day of March, 1897.

[Fannie M. Pratt, Notarial Seal, Douglas County, Nebraska.]

FANNIE M. PRATT,
Notary Public.

Commission expires February 7th, 1902.

Endorsed upon the back appears the following:

U. S. Circuit Court, Dist. of Nebraska. The City of Omaha, v. the Farmers' Loan & Trust Co., et al. Answer of Omaha Water Company. R. S. Hall, Sol. for def't. J. M. Woolworth, of counsel. Filed Apr. 2, 1897, Oscar B. Hillis, Clerk.

End of Exhibit 2, C. W. P.

COPY OF EXHIBIT 3, C. W. P.

In the Circuit Court of the United States for the District of Nebraska.

To the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Sitting in Equity:

And now comes the City of Omaha, complainant herein, and in pursuance of the stipulation of the parties to this cause, including the Omaha Water Company, whereby the said Omaha Water Company has been made a party defendant, and in pursuance of the order of this court in that behalf makes and files this its amendment to its amended and supplemental bill now on file herein, and in addition to the statements, complaints and allegations set forth in said amended and supplemental bill and as supplemental thereto says:

That since the filing of said amended and supplemental petition and before a hearing could be obtained thereon without notice to this complainant and without its knowledge the deed of transfer to which reference is made in said amended and supplemental petition was made, executed and delivered to the said defendant the Farmers' Loan & Trust Company and was thereupon immediately placed upon the records in the office of the register of deeds of Douglas County, Nebraska, and that thereafter with full notice and knowledge of the rights of this complainant and of the pendency of this action, both
 821 actual and constructive, the said Omaha Water Company, a corporation created and existing under the laws of the state of Maine, obtained and received a deed of transfer from said Farmers' Loan & Trust Company covering and pretending to convey to said Omaha Water Company the said property, rights and franchises in said amended and supplemental petition referred to, which

said deed of conveyance was placed upon record in the office of the Register of deeds of said Douglas County, State of Nebraska, and that since such time the said Omaha Water Company without any lawful right whatever and without the consent or authority of this complainant has been and now is attempting to control and operate said water works plant and to exercise rights under said franchise, which franchise this complainant alleges, for the reasons set forth in said amended and supplemental petition is fully terminated and at an end.

Wherefore the said complainant prays as set forth in its said amended and supplemental petition and for such relief as against the wrongful and unauthorized acts of said Omaha Water Company as is prayed for in said amended and supplemental petition against the other defendants named therein, and that the prayed for relief contained in said amended and supplemental petition shall apply to said Omaha Water Company as well as to the several defendants in said amended and supplemental petition named, and your orator in duty bound will ever pay.

W. J. CONNELL,
Solicitor for Complainant.

W. J. CONNELL,
Of Counsel.

DOUGLAS COUNTY, STATE OF NEBRASKA,
District of Nebraska, United States of America, ss:

William J. Connell, being first duly sworn, deposes and says that he is the city attorney of the city of Omaha, and that the City of Omaha is a municipal corporation created, organized and existing under the laws of the State of Nebraska as a metropolitan city.

This affiant has read the foregoing amendment to the amended and supplemental petition, and knows the contents thereof, and says that the matters and things therein set forth are true of his own knowledge as he verily believes.

W. J. CONNELL.

Sworn to before me this the 26th day of March, A. D. 1897.

[SEAL.]

ELIZABETH VANSANT,
Notary Public, Douglas County, Nebraska.

Commission expires March 1, 1901.

822 Doc. S. No. 24. U. S. Circuit Court, District of Nebraska.
City of Omaha, complainant, v. Farmers' Loan & Trust Company, et al., Defendants. Amendment to amended and Supplemental Petition. Exhibit 3. Case Doc. Filed Mar. 30, 1897. Oscar B. Hillis, Clerk of U. S. Circuit Court for the District of Nebraska.

End of Exhibit 3, C. W. P.

COPY OF EXHIBIT 4, C. W. P.

United States Circuit Court, District of Nebraska.

THE CITY OF OMAHA, Complainant,

v.

THE FARMERS' LOAN & TRUST COMPANY et al.

The Joint and Several Answer of the Defendants, The Farmers' Loan & Trust Company and The Omaha Water Company, to the Amendment Filed Herein on the 24th Day of September, 1897, to the Bill of Complaint in This Cause.

These defendants now and at all times hereafter saving and reserving to themselves all benefit and right of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said amendment to the said bill of complaint, for answer thereto, say:

I. These defendants, jointly and severally admit that it is provided in Section 2 of the Ordinance Number 423 referred to in said amendment, that the water to be furnished said ordinance shall by the best systems of purification and by proper settling reservoirs be settled, cleansed and purified and shall be good, clear water suitable for culinary and drinking purposes, and not detrimental to the health of those who use it; and that said provision of said ordinance became and is a part of the contract entered into between Sidney E. Locke and the City of Omaha, and that it was the duty of any company which might for any period of time be operating said plant to furnish water of the kind and quality provided for in said section 2 of said ordinance upon the terms and under the conditions specified in said section.

II. These defendants jointly and severally deny each and every other allegation contained in said amendment to said bill of complaint.

III. These defendants further answering say that when the said City as alleged in the amended bill accepted said works, it further examined and accepted the water furnished thereby as of the quality in all respects called for by the said ordinances and contract in the said amended bill mentioned and referred to and also the
823 appliances for purifying the said water as sufficient and proper for said purposes; that at no time since said acceptance has water of inferior quality been furnished to said City or its inhabitants, nor have facilities for purifying said water been less efficient for the purpose; but, on the other hand, for five years and more last passed the water furnished to said City and its inhabitants has been of greatly better quality in respect of purity and otherwise than was as hereinbefore stated accepted, by said City and the appliances for that purpose have been of greater efficiency in all respects; nor until in the course of the taking of testimony in these causes, did the said city allege or pretend that there had been any failure on the part of any of the companies or of the receivers of this Court to furnish to

said City and its inhabitants, water of the quality mentioned and described in said ordinances.

IV. These defendants jointly and severally deny that the said complainant is entitled to any relief demanded in said bill of complaint by reason of anything alleged in said amendment thereto.

Wherefore, these defendants pray leave to be dismissed with their reasonable costs and charges in this behalf, most wrongfully sustained.

THE FARMERS' LOAN & TRUST
COMPANY AND
THE OMAHA WATER COMPANY,
By R. S. HALL, *Their Solicitor.*

R. S. HALL,
J. M. WOOLWORTH,
Of Counsel.

And upon the back thereof appears the following: No. 24 "S." U. S. Cir. Court, District of Nebr. The City of Omaha v. The Farmers' Loan & Trust Co., et al. Answer to Amended Bill of Complaint. Filed Sep. 28, 1897. Oscar B. Hillis, Clerk.

End of Exhibit 4, C. W. P.

COPY OF EXHIBIT 8, C. W. P.

Vacation of Streets and Alleys.

Ordinance No. 9.

An Ordinance to Vacate Certain Streets and Alleys in the City of Florence.

Be it Ordained by the Mayor and Council of the City of Florence:

SECTION 1. That the streets and alleys in the city of Florence, bounded and described as follows be, and the same are hereby declared vacated:

SEC. 2. Commencing at the intersection of the Missouri river and the west line of Water Street, thence south to the intersection of the north line of Washington street with the line of Water Street; thence west on the north line of Washington Street with the C. St. P. M. & O. R. R. right of way in block 79; thence north on the west line of the alley through blocks 74, 66, 67, 52, 48, 40 and 38, or on the east line of said R. R. right of way to the south line of Willet Street; thence westerly along the south line of Willet street to said railroad right of way, and thence north and west along and on said railroad right of way, to the intersection of Fifth Street with the railroad right of way; thence north on east line of Fifth Street to the south line of intersection of Fifth and Bridge streets; thence east on the south line of Bridge street easterly to the Missouri river.

SEC. 3. All the streets and alleys situated within the above described boundaries are hereby declared to be vacated, in consideration

that a right of way fifty feet wide from Mill creek across the north west corner of block 127 be granted and deeded to the City of Florence, as a continuous approach to Bridge street east to Mill creek, and that said fifty feet constituting said right of way and Bridge street east to Mill creek, and that said fifty feet constituting said right of way and Bridge street east of Mill creek be properly graded as an approach to, and be easily accessible from the Missouri River; in consideration also that Washington Street be graded properly to make passable to Water Street.

In consideration of the city of Florence vacating the streets and alleys above described to the American Water Works Co., the city of Florence is to have the same rights, prices and privileges in the use of water for fire and domestic purposes as is enjoyed or shall be enjoyed by the city of Omaha.

SEC. 4. Provided the American Water Works Company shall hold the city of Florence harmless against any person or persons whosoever, for damages arising from the vacation of the streets and alleys in the tract above described.

SEC. 5. This ordinance shall take effect and be in force from and after its passage.

Passed September 3rd, 1897.

Attest:

F. M. KING,
City Clerk.

End of Exhibit 8, C. W. P.

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COPY OF EXHIBIT 9, C. W. P.

Water Works.

Ordinance No. 31.

At Ordinance to Procure a Supply of Water for the City of Florence and its Inhabitants and to Contract with the American Water Works Co. for a Supply for Fire and Domestic Purposes.

Be it Ordained by the Mayor and Council of the City of Florence

SECTION 1. The right, privilege and franchise, to use the streets and alleys, and public places of the city of Florence for the purpose of laying down, maintaining, repairing and renewing water mains and pipes, hydrants and valves, is hereby granted to the American Water Works Co., its successors and assigns.

SEC. 2. The American Water Works Co., shall, within three months after the passage of this ordinance, lay down water pipes in the streets of said Florence, as follows:

On State Street from 4th to Prospect Street and on Main Street from Monroe to Calhoun Street, and shall set thereon twelve (12) double fire hydrants, at the following points and places, viz:

One at northeast corner of State and 4th streets.
One at northwest corner of State and 5th streets.
One at northeast corner of State and Main streets.
One at northwest corner of State and Bluff streets.
One at northeast corner of State and Prospect streets.
One at southwest corner of Madison and Main streets.
One at southwest corner of Harrison and Main streets.
One at southwest corner of Monroe and Main streets.
One at northwest corner of Willet and Main streets.
One at northwest corner of Jefferson and Main streets.
One at northwest corner of Clay and Main streets.
One at northwest corner of Calhoun and Main streets.

And the said company shall hereafter extend its mains, and set hydrants thereon, whenever ordered so to do by the city council of said city of Florence, provided, however, that no such extension shall be made unless a hydrant is ordered for each 400 feet of extension.

826 SEC. 3. The city of Florence hereby rents of the said American Water Works Co., the right to use any of said twelve hydrants, and such other hydrants as it may from time to time order to be set during the whole term of fourteen years from the 1st day of September, 1889, and will pay therefor the sum of sixty dollars (\$60) per annum for each alternate hydrant from the respective days, when such hydrants may be respectively set and ready for use, for the first five years ensuing September 1st, 1889, and the sum of sixty Dollars (\$60) per annum for each of said hydrants for the remainder of said term of fourteen years, payable on the 1st day of July of each year at the office of the company in the city of Florence.

SEC. 4. The said company or its assigns shall, during the term of fourteen years, keep said mains, pipes and hydrants mentioned in section 2 of this ordinance, and such additional mains, pipes and hydrants as shall be ordered and set under the terms hereof, at all times supplied with water, from its main pipe or pipes leading to the city of Omaha, from its pump house in Florence, and shall at all times keep and maintain such mains, hydrants and pipes in good order and repair, unavoidable accidents excepted.

SEC. 5. Water shall be supplied during said term of fourteen years, free of charge, by the company for drinking and washing purposes at each public school which shall be maintained in the City of Florence, and for public drinking fountains for man and beast, to be furnished and set by the company.

SEC. 6. The said company and its assigns shall furnish water to citizens residing along the line of said mains, at the prices now fixed by ordinance in the City of Omaha, under such rules as the company now has governing connections with its mains, and the use of water by private consumers in the city of Omaha.

The company shall be at liberty to inspect any service or service pipe, at any reasonable hour, to stop waste of water, to reject any service pipe as unsuitable, and to regulate the use of water by all usual and customary regulations.

SEC. 7. Should the prices of hydrant rental at any time during

said term, be reduced in the city of Omaha, then the same reduction shall be made in the city of Florence, for the remainder of the unexpired term, on the city of Florence complying with the same terms which may be the consideration for such reduction in Omaha.

827 SEC. 8. The city shall be responsible for any injury occasioned to any main, pipe or hydrant, by an officer, or agent or servant of the city.

The city shall designate annually, certain persons who shall be permitted to open and close fire hydrants, and then only in case of an alarm of fire. And the city shall by ordinance, protect the property of the company from injury by trespassers, and its water supply free from pollution, to such an extent as may be possible.

SEC. 9. The company shall hold the city blameless of, and free from any damage caused to person or property, on account of any excavation by the company, in the streets and public places of the city.

SEC. 10. Whenever the said company shall at any time make any excavation in the streets of Florence, for the purpose of laying, or relaying, repairing, or renewing any pipe, valve or hydrant, the said company shall restore the same to as good condition as the same was in previous to any such excavation, and upon any failure so to do for thirty days succeeding notification of that fact from the city council of said city, the said city may proceed to restore the said street at the expense of the said company.

SEC. 11. The city shall establish grades for all of its streets, upon which it may by this ordinance, or at any time hereafter, order the laying of any pipes by the said company, and the said company shall either lay its pipes so as to conform to the grade line so established, without expense to the city, or whenever the street is actually graded cause the pipe to be laid so as to conform to it, causing any excavation it shall make in doing such work to be restored, and the street to be put in as good order as if the company had originally laid its pipe to conform to grade. It is understood that all pipes laid in the city shall have at least a covering of $4\frac{1}{2}$ feet of earth.

SEC. 12. Upon the acceptance of this ordinance in writing signed by the president or secretary of the company, under the seal of the company, the same shall become a contract between the city and the company.

SEC. 13. This ordinance shall take effect and be in full force from and after its passage.

Passed August 13th, 1889.

H. HALL, *Mayor.*

Attest:

J. WEBER, JR.,
City Clerk.

End of Exhibit 9, C. W. P.

Water Works Prohibition.

Ordinance No. 32.

An Ordinance to Prohibit Interference with the Pumps, Buildings, Reservoirs, Basins, Pipes, Valves Hydrants, Property, and Employees of the American Water Works Company, in the City of Florence; to Prohibit Interference with its Operations, and the Pollution of Water, and to Prescribe Penalties therefor.

Be it ordained by the Mayor and Council of the City of Florence:

Whereas: The American Water Works Company has undertaken the public duty of supplying the city of Florence, and the inhabitants thereof, with water for the extinguishing of fires and for domestic purposes and uses, and stands charged with a public duty thereby, and is constructing and proposes to maintain, in the said city, a system of water works and,

Whereas: A part of the consideration for the undertaking such duty by said company was that said city would adopt and maintain this ordinance, during such time as said company or its assigns, should be charged with such duty.

SECTION 1. No person shall open, break, bore, tap, dip up, or otherwise interfere with any main, pipe, valve, or hydrant laid down by the American Water Works Co. or its assigns in the City of Florence, without the permission of said company or its assigns.

No person shall break, dig, molest or injure any building, wall, crib, caisson, structure, or machinery, basin or reservoir of the said American Water Works Co. in said City of Florence, used by its as a part of, or in connection with its water works in said Florence, without permission from said company, or its assigns, provided, however, that nothing in this section shall apply to the opening of hydrants in case of fire alarm, by firemen regularly appointed for that purpose in accordance with Section 8, of an ordinance entitled "An ordinance to procure a supply of water for the City of Florence, and its inhabitants, for fire and domestic purposes and to contract with the American Water Works Company therefor," passed August 13th, 1889.

SEC. 2. No person shall in any manner throw into, or deposit in any basin of said water works, any filth, or any sticks stones, or other substances, and no person shall bathe in any such reservoir or basin.

829 SEC. 3. No person shall knowingly permit any dog, or any other animal in any basin or reservoir of the said company.

SEC. 4. No person shall trespass or enter upon the enclosed grounds of said Co., in said City of Florence, used for water works purposes, or into any engine room, pump room, or boiler room, except by permission of the Co. or to remain there after being warned to leave.

SEC. 5. No person shall, without lawful authority, molest or inter-

fere with any person engaged in the operation of said water works, while so engaged, or interfere to hinder or prevent the carrying on of such operation of said works.

SEC. 6. Any person convicted of any violation of this ordinance, shall be punished by fine not to exceed \$100.00 for any one offense, recoverable with costs, and in default of payment, be confined in the county jail of Douglas, for a period not to exceed ninety days, or by confinement in the city prison with hard labor upon the streets or elsewhere for the benefit of the city for a period not to exceed ninety days.

SEC. 7. The Mayor may, upon the request of the said company, appoint two or more persons, citizens of Florence, of good repute, as special policemen without cost to the city, to patrol the grounds and buildings of said company and prevent the violation of this ordinance, and to arrest the violators thereof whenever the offense is committed in their presence, and to prevent the committing on said grounds, or in or about the said buildings, any felony or misdemeanor under the laws of the state, and to arrest the perpetrators thereof, if any such offense shall be committed in their presence, and such special policemen shall be vested with all the powers, which can be lawfully conferred upon the police of said city.

No such special policemen shall be appointed for a longer period than one year.

SEC. 8. This ordinance shall take effect and be in full force from and after its passage.

Passed August 13th, 1889.

H. HALL, *Mayor*.

Attest:

J. WEBER, *City Clerk*.

End of Exhibit 10, C. W. P.

COPY OF EXHIBIT 11, C. W. P.

Water-works Side-track.

Ordinance No. 34.

830 An Ordinance to Grant Right of Way to the American Water Works Company for a side-track from the Chicago, St. Paul, Minneapolis & Omaha Railroad, across Main, Bridge and Fifth Streets, in the City of Florence, Nebraska.

Be It Ordained by the Mayor and Council of the City of Florence:
SECTION 1. That a right of way for a single tracked side-track running from the pump-house of the American Water Works Company in the City of Florence, to the track of the C., St. P., M. & O. R. R. Co., across Main, Bridge and Fifth Streets, in the said city of Florence be, and the same is hereby granted to the American Water Works Co., as follows:

Crossing Fifth street between Pacific and Bridge Streets in a westerly and northwesterly direction, crossing Bridge street between Fifth and Main streets in a westerly and northwesterly direction, at and near the intersection of Bridge and Main streets and crossing Main street at the intersection of Main and Bridge Streets in a northwesterly direction.

The said right of way is granted to the American Water Works Co., to enable the said company to have a side-track laid from the line of the C., St. P., M. & O. R. R. Co., to its pump-house, for the purpose of setting in supplies, cars of coal, and other materials for the use of said American Water Works Company.

SEC. 2. The said Water Works Co., and its assigns shall, in laying or causing to be laid, the said side-track, disturb the streets to no greater extent than is necessary, and whenever the said side-track shall cross any of said streets, approaches to said track shall be maintained in a suitable manner at all times, so that the same may be crossed by persons using said streets, with no more inconvenience than is absolutely necessary.

SEC. 3. Provided, however, that said track is laid to present grade of said streets, and to comply with any grade that may be established on said streets hereafter by the mayor and council of the city of Florence.

SEC. 4. This ordinance shall take effect and be in force from and after its passage.

Passed December 2nd, 1889.

H. HALL, *Mayor*.

Attest:

J. WEBER, *City Clerk*.

End of Exhibit 11, C. W. P.

831

COPY OF EXHIBIT 12, C. W. P.

Copy of Proposition.

To the Honorable Mayor and the Common Council of the city of Florence, Nebraska:

In fulfillment of the contract heretofore made between the City and the American Water Works Company, whereby certain streets in the City of Florence proposes to lay pipes and furnish water to the City of Florence, upon the following terms and conditions, viz: That the Mayor and Council adopt the two Ordinances presented herewith. You will notice that it is provided by one of the Ordinances, viz: that in regard to the setting of hydrants, etc., that instead of the City being obliged to pay for all of the hydrants ordered during the term of fourteen years mentioned, that only on every alternate hydrant is there any charge made, for a period of five years, while in the City of Omaha a charge is made for a hydrant every four hundred feet; and the hydrants are calculated to be set each four hundred feet, but you only pay for one-half of them for the first five years, and after that time for all of them.

The Company feels disposed to do this, in consideration of the privileges heretofore granted and now being enjoyed by the Company in your City, and those granted in the present Ordinances, and particularly, in view of the fact that the Water Works are used mainly for the benefit of Omaha, and that in laying pipes they will be laid for the benefit of Omaha as well as for the benefit of Florence.

The first of these Ordinances presented herewith is entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants, for fire and domestic purposes, and to contract with The American Water Works Company therefor." And the second of said Ordinances is entitled "An Ordinance to prohibit interference with the pumps, buildings, reservoirs, basins, pipes, valves, hydrants, property and employees of The American Water Works Company in the City of Florence, to prohibit interference with its operations, and the pollution of water, and to prescribe penalties therefor.

Dated August 12, 1889.

(Signed)

THE AMERICAN WATER WORKS
COMPANY.

W. A. UNDERWOOD, *Pres't.*

End of Exhibit 12, C. W. P.

832

COPY OF EXHIBIT 13, C. W. P.

Copy of Acceptance.

To the Mayor and Council of the City of Florence, Nebraska:

GENTLEMEN: The American Water Works Company hereby accepts an Ordinance passed by the Mayor and Council of the City of Florence, August 13, 1889, entitled "An Ordinance to procure a supply of water for the City of Florence and its inhabitants, for fire and domestic purposes, and to contract with The American Water Works Company therefor", and the said The American Water Works Company also accepts an Ordinance passed on the same day, entitled "An Ordinance to prohibit interference with the pumps, buildings, reservoirs, basins, pipes, valves, hydrants, property and employees of the American Water Works Company in the City of Florence, to prohibit interference with its operations, and the pollution of water, and to prescribe penalties therefor", as being in full compliance with the terms of Section Eight of the first mentioned Ordinance. And in consideration of the passage of said Ordinances the said The American Water Works Company agrees that said first named Ordinance shall be and is a contract between the City and Company, and will proceed to lay the pipe, set the hydrants, and furnish the water and do and perform all the other things to be by it done and performed, according to the terms of said first mentioned Ordinance.

In Witness Whereof, The said The American Water Works Company hath caused this instrument to be executed by its President

and Secretary and under its corporate seal, this fifteenth day of August, A. D. 1889.

(Signed) THE AMERICAN WATER WORKS CO.
W. A. UNDERWOOD, *Pres't.*
[SEAL.] W. H. HALL, *Sec'y.*

I, M. B. Thompson, Clerk of the City of Florence do hereby certify that the above and foregoing are true copies of Ordinance passed and approved by the Mayor and Council of the City of Florence at a regular meeting on August 13, 1889, as shown by the records in my office.

Witness my hand this 2nd day of April, 1906.

M. B. THOMPSON, *City Clerk.*

End of Exhibit 13, C. W. P.

Endorsed: Filed Jun- 16, 1906. Geo. H. Thummel, Clerk.

833 Thereupon afterwards, to-wit: There was offered in evidence in the case of Omaha Water Company vs. City of Omaha, No. 74 Docket "X", The Resolution for the appointment of new appraisers filed in the case of the Water Board of the City of Omaha, et al., vs. Daniel W. Mead, et al., No. 209 Docket "W", which said Resolution is in words and figures following, to-wit:

For New Appraisers.

The resolution for the appointment of new appraisers reads as follows:

Whereas, The Water Board of the City of Omaha has this day, under and by virtue of the powers vested in it, rejected the report of appraisement of the water works, as agreed upon and signed by Daniel W. Mead and G. H. Benzenberg.

Therefore Be It Resolved, That the water board of the City of Omaha appoint a new appraiser, to the end that the reappraisement of the water works may be proceeded with regularly and in all due haste; said appraisers to be selected by the said water board within a convenient time, and as soon as may be from this date, and that when so selected that the Omaha Water Company be advised of his selection, and

Be it Further Resolved, that the Omaha Water Company be and is hereby notified that the said report so signed by Daniel W. Mead and G. H. Benzenberg has been rejected by the water board of the city of Omaha, and that the Omaha Water Company be requested to select an engineer as appraiser on its part so that the new appraisement may be begun and proceeded with in a regular and proper manner, and with all convenient speed, and

Be It Further Resolved, That the secretary of the water board serve a certified copy of these resolutions upon the Omaha Water Company.

Endorsed: Filed Jul. 29, 1907. Geo. H. Thummel, Clerk.

UNITED STATES OF AMERICA,
District of Nebraska,
Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the order of court, and in compliance with the Præcipe a copy of which is found on page 433, the foregoing record 834 (consisting of two volumes, marked Volume I and Volume II) has been made.

That a certificate of the Clerk is attached to Volume I. That said record is a true and faithful transcript of the pleadings and proceedings of record and on file in this court as mentioned in said Præcipe and as indicated in the indexes attached to each volume in the case of The Omaha Water Company, complainant, versus The City of Omaha, No. 74 Docket "X", and that a copy of the Citation duly certified has been lodged and remains in my said office as such Clerk.

Witness my hand and the seal of said Court at Omaha, in said district, this — day of August, A. D. 1907.

[Seal U. S. Circuit Court, Omaha Division, District of Nebraska.

GEO. H. THUMMEL, *Clerk.*

Filed Aug. 10, 1907. John D. Jordan, Clerk.

United States Circuit Court of Appeals, Eighth Circuit.

No. 2683.

OMAHA WATER COMPANY, Appellant,
 vs.
 THE CITY OF OMAHA, Appellee.

It is hereby stipulated and agreed that the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit shall prepare and attach to the transcript of record in the above entitled cause a copy of Exhibit ZZ, being the deed from the Omaha Water Company to City of Omaha, dated July 9, 1906, the original of which exhibit is lodged in said Clerk's office pursuant to the order of the Circuit Court of the United States for the District of Nebraska, and that such copy shall be printed as a part of the printed record upon which this cause shall be heard upon the appeal.

R. V. HALL,
Counsel for Appellant.
 JNO. L. WEBSTER,
Counsel for Appellee.

No. 2683. Omaha Water Company, Appellant, vs. City of Omaha. Stipulation to print original deed tendered to City of Omaha. Filed Nov. 7, 1907. John D. Jordan, Clerk.

This indenture made the ninth day of July, in the year one thousand, nine hundred and six, between the Omaha Water Company, party of the first part, and the City of Omaha, party of the second part, Witnesseth:

Whereas said Omaha Water Company is a corporation duly
835 incorporated and existing under and by virtue of the laws of the State of Maine; and

Whereas, said City of Omaha is a municipal corporation, duly incorporated and existing under and by virtue of the laws of the State of Nebraska, and is a city of the metropolitan class as determined by the laws of the said state now in force; and

Whereas, said Omaha Water Company owns and operates the system of water works hereinafter described, located in the City of Omaha and places adjacent thereto in the County of Douglas, in the State of Nebraska; and

Whereas, the construction of said water works was undertaken and begun under the terms of a certain ordinance of said City of Omaha, No. 423, duly passed by the City Council of said city and duly approved by the Mayor of said city on the 11th day of June, 1880, and said water works, as originally constructed under and by virtue of said ordinance No. 423 and ordinances of the City of Omaha amendatory thereof and supplemental thereto and the certain contract entered into in accordance therewith and approved by the City Council of said City of Omaha on the 20th day of July, 1880, were accepted by the Mayor and City Council of said City by ordinance No. 618 duly passed by said City Council and approved by the Mayor of said City on the 4th day of September, 1883; and

Whereas, said water works, which were originally constructed by the City Water Works Company of Omaha, assignee, and successor of Sidney E. Locke, by whom the right to construct the same was originally acquired, under and in pursuance of said ordinance, and with whom said contract was made, have since been enlarged and extended from time to time by said City Water Works Company of Omaha, and by the American Water Works Company of Illinois, assignee, of said City Water Works Company of Omaha, and by said Omaha Water Company, which acquired all the property, right, title and interest of said American Water Works Company of Illinois, in and in respect to said water works and said ordinances, under and in pursuance of proceedings for the foreclosure of certain mortgages thereon of said American Water Works Company of Illinois; and

Whereas, by the terms of said ordinance No. 423, the City of Omaha had the right at any time after the expiration of twenty (20) years to purchase the said water works at an appraised valuation which should be ascertained by the estimate of three engineers, one
to be selected by the City Council, one by the Water Works
836 Company, and these two to select a third; provided that nothing should be paid for the unexpired franchise of said Company; and

Whereas, said City of Omaha, by ordinance No. 5162, duly passed by the City Council of said city, and duly approved by the Mayor of

said city, on the second day of March, 1903, duly elected and determined to purchase and acquire the system of water works operated by said Omaha Water Company; and

Whereas, said the City Council of said City of Omaha, by resolution duly adopted on the 12th day of May, 1903, duly selected, designated and appointed John W. Alford, an engineer, as an appraiser for the purpose of ascertaining the appraised valuation of the said water works then owned and operated by said Omaha Water Company, and said Omaha Water Company thereafter, by action of its Board of Directors, duly selected, designated and appointed George H. Benzenberg, an engineer, as the second appraiser for said purpose, and thereafter said two appraisers duly selected Daniel W. Mead, an engineer, as the third appraiser for said purpose; and

Whereas, said board of appraisers have made an estimate of the value of the said water works by which it is ascertained that the appraised valuation thereof at which said City of Omaha had the right, which said city has exercised as aforesaid, to purchase the said water works, is the sum of six million two hundred sixty-three thousand two hundred ninety-five and 49/100 dollars (\$6,263,295.49).

Now, therefore, in consideration of the premises and of the said sum of six million two hundred sixty-three thousand two hundred ninety-five and 49/100 dollars (\$6,263,295.49) received by said Omaha Water Company from said City of Omaha, said Omaha Water Company hath granted, bargained, sold, released, remised, enfeoffed, confirmed, conveyed, assigned and transferred, and by these presents doth grant, bargain, sell, release, remise, enfeoff, confirm, convey, assign and transfer unto the said the City of Omaha, its successors and assigns, all the lands and other properties and rights hereinafter described, namely:

All those several pieces and parcels of land, known and described as follows, with all buildings and other structures on any thereof:

That certain piece or parcel of land described as follows: Beginning at the intersection of the west bank of the Missouri River with the south line of Bridge Street in the City of Florence, Douglas

County, Nebraska, and running thence westerly along the south line of said Bridge Street to the east line of Fifth Street in said city; thence southerly along the east line of Fifth Street to the right of way of the Chicago, St. Paul and Minneapolis Railroad; thence southerly, along the east line of said right of way, to the south line of State Street, in said city; thence easterly, along the south line of said State Street, to the east line of said railroad right of way south of State Street; thence southerly along said right of way to the north line of Washington Street in said city; thence easterly along the north line of said Washington Street to the east line of Mill Street in said city; thence northerly along the east line of said Mill Street to the northwest corner of block two hundred and fifty-eight (258) in said city; thence easterly along the north line of said block two hundred and fifty-eight (258) to its intersection with the west bank of the Missouri River; thence northwesterly along the west bank of the Missouri River, in all its meanderings, to the place of beginning.

Also, that other piece or parcel of land in said City of Florence known and described as blocks number two (2), one hundred and twenty-six (126), and two hundred and sixty (260) as laid down on the plat of said city, recorded in the Registrar's office of said Douglas County.

Also, those parts of Adams, Farnam and Sheffield Streets, heretofore vacated in said City of Florence, lying between the west line of Water Street and the east line of Mill Street in said city.

Also, that other piece or parcel of land known and described as the north fifty (50) feet of lot eighteen (18), and west ten (10) feet of the north fifty (50) feet of lot seventeen (17), both in block two (2) of Armstrong's addition to the City of Omaha, according to the plat of said addition, recorded in the office of the Registrar of Deeds of said Douglas County.

Also, that other parcel of land known as Block B, in Reservoir addition to the City of Omaha, according to the plat of said addition recorded in the office of the Registrar of Deeds of said county.

Also, those other parcels of land known as lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7) and eight (8) in block Q, and lots one (1), two (2), five (5) and six (6) in block three hundred and twenty-eight (328), in the City of Omaha, according to the plat thereof recorded in the aforesaid Registrar's office.

Also, that certain other parcel of land in said City of Omaha, described as follows:

838 That part of Government lots three and four in section fourteen, township fifteen, range thirteen, described as follows:

Commencing at the intersection of the west bank of the Missouri River with the south line of Burt Street projected east, thence west to a point one hundred and seventy-seven feet (177') east of the northeast corner of block three hundred and sixty (360), thence in a northwesterly direction following line of fence about one hundred and fifty feet (150'), to fence corner, thence west along line of fence about one hundred and forty-five feet (145') to the east line of block three hundred and twenty-eight (328), thence north along east line of block three hundred and twenty-eight (328) and block Q, to a point thirty-nine and seventy-seven one-hundredths feet (39.77') north of the northeast corner of block Q, thence east to the bank of the Missouri River, thence in a southerly direction along said river bank to the place of beginning, except the right of way of the Union Pacific Railway, same being now enclosed and occupied by the Omaha Water Company.

Also, a tract of land in the City of Florence, Douglas County, Nebraska, described as follows:

Commencing at the northwest corner of Third and Davenport Streets, running thence westerly along the north line of Davenport street to the center of creek bed, thence northeasterly along the meandering line of the creek bed to the right of way of Third Street or its projection (commonly known as the "River Road"), thence southeasterly along the west line of said Third Street or River Road to the place of beginning.

Also, those two other pieces or parcels of land described as follows:

Lots seven (7) and ten (10), in block seventeen (17) of Kountze's and Ruth's Addition to the City of Omaha, according to a plat of said addition recorded in said Registrar's office; and also that certain other parcel of land known and described as the west twenty-five (25) acres of the south one-half of the northeast one quarter of section seven (7), in township fifteen (15), north of range thirteen (13), east of the sixth principal meridian. And all other land in the County of Douglas and State of Nebraska, and all the right, title and interest therein, whereof the Omaha Water Company is seized.

Also, all the property and rights of said Omaha Water Company in and in respect to the water supply from the Missouri River now utilized by said company.

Also all and singular the water pipes, mains, valves, meters, hydrants and other apparatus of said Omaha Water Company, 839 now lying and being along, upon or under the public streets, alleys, public squares and public places and elsewhere in the City of Omaha, the City of South Omaha, the City of Florence, and in Dundee, Benson and East Omaha, places adjacent to the City of Omaha, in the County of Douglas, in the State of Nebraska; and all the machinery, pumps, boilers and engines, tools, material on hand, maps and plans, drawings and schedules, records of hydrants, connections and meters, and other personal property and assets of said Omaha Water Company, located in said cities and other places, except moneys and bills and accounts receivable, hydrant rentals and claims, whether against any of said cities or the local authorities of any of said places or any of the citizens or inhabitants thereof or any persons or corporations whatsoever, and not including the books of minutes and books of account and the incorporation and other papers and vouchers of said Omaha Water Company; and the Treasury assets of said company;

Also, all the prop-erty, right, title and interest of said Omaha Water Company under or by virtue of said contract between said City of Omaha and Sidney E. Locke, dated the 20th day of July, 1880, and under or by virtue of an ordinance of said City of South Omaha, known as ordinance No. 29, entitled "An ordinance granting an exclusive right to lay a system of water works in the streets and alleys and public places in the City of South Omaha, Douglas County, Nebraska, for the sale of water for domestic and fire purposes to the American Water Works Company of Chicago, Illinois, for the term of seventeen (17) years," passed by the City Council of said City of South Omaha, and approved by the Mayor of said city on the 17th day of October, 1887, and under or by virtue of an ordinance of said City of South Omaha, known as ordinance No. 1154, entitled, "An ordinance authorizing and making a contract between the City of South Omaha and the Omaha Water Company, for a water supply for a period of ten (10) years from and after the 17th day of October, 1904," passed by the City Council of said city and approved by the Mayor of said city on the 25th day of October, 1903, as amended by an ordinance known as No. 1181, passed by the City Council of said city, on the 30th day of November, 1903, and approved by the

Mayor of said city on the 4th day of December, 1903, and under or by virtue of an ordinance of said city of Florence, known as Ordinance No. 9, passed by the City Council of said city and approved by the Mayor of said city on the 3rd day of September, 1887, whereby certain streets in said City of Florence were vacated for the use of said American Water Works Company, and under or by virtue of an ordinance of said City of Florence, known as Ordinance No. 31, entitled, "An ordinance to procure a supply of water for the City

of Florence and its inhabitants for fire and domestic purposes

840 and to contract with the American Water Works Company therefor," passed by the City Council of said city and approved by the Mayor of said city on the 13th day of August, 1889,

and under or by virtue of an ordinance of said City of Florence known as Ordinance No. 32, entitled, "An ordinance to prohibit interference with pumps, buildings, reservoirs, basins, pipes, valves, hydrants, property and employees of the American Water Works Company in the City of Florence, to prohibit interference with its operations and the pollution of water and to prescribe penalties therefor," passed by the City Council of said city and approved by the Mayor of said city on the 13th day of August, 1889, and under and by virtue of the contract between said American Water Works Company and said City of Florence through the acceptance of said last named ordinances by said company under date of August 15, 1889, and under or by virtue of an ordinance of said City of Florence, known as No. 160, entitled "An ordinance amending sections 3, 4, 5, 6 and 7 of an ordinance entitled "An ordinance to procure a supply of water for the City of Florence and its inhabitants and to contract with the American Water Works Company for a supply for fire and domestic purposes," and approved August 13, 1889, and repealing said Sections 3, 4, 5, 6 and 7 of said original ordinance," passed by the City Council of said city and approved by the Mayor of said city on the 2nd day of November, 1903, and under or by virtue of arrangements and agreements made by said Omaha Water Company, or any of its predecessors in interest, with the local authorities of said Dundee, Benson and East Omaha, in connection with supplying the citizens and inhabitants of said places with water for domestic mechanical and fire purposes;

Also all the property, right, title and interest of said Omaha Water Company, in or by virtue of connections between the pipes and mains of said company and the various dwellings, stables, stores, shops, factories, churches, halls, theatres and other buildings and structures, stockyards and other business enterprises, within the said cities of Omaha, South Omaha and Florence and within said other places, and all existing contracts of said Water Company with private consumers of water within said cities and other places;

It being the purpose and intent of said Omaha Water Company to convey, assign and transfer hereby to said City of Omaha, pursuant to the purchase elected to be made by said City of Omaha, as aforesaid, the entire system of water works operated by said Omaha Water Company, wherever located, together with the appurtenances, and all

its property and rights in and in respect thereto, including
 841 the right of said Omaha Water Company to maintain and
 operate the same and any and every part thereof, and to re-
 ceive the income from the future operation thereof;

All of the above described property being situated in Douglas
 County, Nebraska;

To have and to hold all and singular the above described land
 and other properties and rights hereby conveyed, assigned and trans-
 ferred or intended to be conveyed, assigned and transferred unto the
 said City of Omaha, its successors, legal representatives and assigns
 forever.

Subject, nevertheless, to the obligations of said Omaha Water
 Company to the citizens and inhabitants of said cities of Omaha, and
 to the Cities of South Omaha and Florence, and the citizens and in-
 habitants thereof, and to the authorities of Dundee, Benson and East
 Omaha, and the citizens and inhabitants of those places, under or by
 virtue of the ordinances, agreements and arrangements hereinbefore
 set forth, all of which obligations are to be assumed by said City of
 Omaha.

The said Omaha Water Company covenants that it has not done or
 suffered anything whereby the vesting of said lands and other prop-
 erties and rights in said City of Omaha by virtue hereof, free of en-
 cumbrances, is now or may hereafter be impeached or impaired.

The said Omaha Water Company further covenants that it will
 execute such further instruments and do such further acts as may
 be necessary or be reasonably required to vest fully in said City of
 Omaha the title to the lands and other properties and rights herein-
 before described, and intended to be hereby conveyed and transferred.

In witness whereof, said Omaha Water Company has caused its
 corporate seal to be hereto affixed, and this instrument to be signed
 by its President, the day and year first herein written.

[Seal Omaha Water Company, State of Maine, Incorporated
 1896.]

THE OMAHA WATER COMPANY,
 By THEODORE C. WOODBURY,
President.

In presence of:
 PAUL L. MARTIN.

STATE OF NEBRASKA,
 County of Douglas, ss:

On this ninth day of July, 1906, before me, a Notary
 842 Public, duly qualified, and residing in said county, personally
 came Theodore C. Woodbury, to me personally known
 and known to me to be the President of the Omaha Water Company,
 the corporation described in and which executed the foregoing in-
 struments, who, being by me duly sworn, did depose and say: That
 he, the said Theodore C. Woodbury, is the President of said Omaha
 Water Company, and knows the corporate seal of said company, and
 that the seal affixed to the foregoing instrument is such corporate

seal and was so affixed by authority of the Board of Directors of said corporation, and that he, the said Theodore C. Woodbury, as such President, subscribed his name thereto, for and on behalf of said corporation, by the like authority, and the said Theodore C. Woodbury also acknowledged the execution of said instrument to be the act of the said Omaha Water Company, for the uses and purposes set forth in said instrument.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[NOTARIAL SEAL.]

PAUL L. MARTIN,
Notary Public, Douglas County, Nebraska.

Com. expires Nov. 6, 1911.

UNITED STATES OF AMERICA,

District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, hereby certify that the attached Deed of Omaha Water Company to City of Omaha, dated July 9, 1906, marked Exhibit ZZ is the original as used in evidence in the case of Omaha Water Co. vs. City of Omaha, No. 74 "X."

Witness my hand and the seal of said Court of Omaha in said district, this 29th day of July, A. D. 1907.

[Seal U. S. Circuit Court, District of Nebraska, Omaha Division.]

GEO. H. THUMMEL, *Clerk.*

74X. Exhibit ZZ. Omaha Water Company to City of Omaha. Deed. Dated July 9, 1906. Filed July 22, 1907. Geo. H. Thummel, Clerk.

843

(Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of Omaha Water Company, Appellant, vs. The City of Omaha, No. 2683, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of May, A. D. 1908.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

844 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1907, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the second day of December, A. D. 1907, before the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John E. Carland, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the tenth day of August, A. D. 1907, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Nebraska, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Omaha Water Company was Appellant and The City of Omaha was Appellee, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2683.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

845 (*Appearance of Counsel for Appellant.*)

On the thirteenth day of August, A. D. 1907, the appearance of counsel for appellant was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2683,

OMAHA WATER COMPANY, Appellant,
vs.
THE CITY OF OMAHA.

The Clerk will enter *my* appearance as Counsel for the Appellant.

HOWARD MANSFIELD.
R. S. HALL.
JOHN F. STOUT.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2683. Omaha Water Company, Appellant, vs. The City of Omaha. Appearance. Filed Aug. 13, 1907, John D. Jordan, Clerk. Howard Mansfield, R. S. Hall, John F. Stout, Counsel for Appellant.

(Appearance of Mr. Harry E. Burnam as Counsel for Appellee.)

And on the eighteenth day of November, A. D. 1907, the appearance of Mr. Harry E. Burnam, as counsel for the appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA.

The Clerk will enter my appearance as Counsel for the Appellee.
HARRY E. BURNAM.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No.
2683. Omaha Water Company, Appellant, vs. The City of
846 Omaha. Appearance. Filed Nov. 18, 1907, John D. Jordan,
Clerk. Harry E. Burnam, Counsel for Appellee.

(Appearance of Mr. C. C. Wright as Counsel for Appellee.)

And on the eighteenth day of November, A. D. 1907, the appearance of Mr. C. C. Wright, as counsel for the appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA.

The Clerk will enter my appearance as Counsel for the Appellee.
C. C. WRIGHT.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No.
2683. Omaha Water Company, Appellant, vs. The City of Omaha.
Appearance. Filed Nov. 18, 1907, John D. Jordan, Clerk. C. C.
Wright, Counsel for Appellee.

(Appearance of Mr. John L. Webster as Counsel for Appellee.)

And on the nineteenth day of November, A. D. 1907, the appearance of Mr. John L. Webster, as counsel for the appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA.

The Clerk will enter my appearance as Counsel for the Appellee.
JNO. L. WEBSTER.

847 (Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2683. Omaha Water Company, Appellant, vs. The City of Omaha. Appearance. Filed Nov. 19, 1907, John D. Jordan, Clerk. John L. Webster, Counsel for Appellee.

(Order of Submission.)

And on the seventh day of January, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907.

TUESDAY, January 7, 1908.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause having been called for hearing, argument was commenced by Mr. Howard Mansfield in behalf of the appellant, continued by Mr. C. C. Wright and Mr. John L. Webster for the Appellee and concluded by Mr. Howard Mansfield for the appellant.

Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the seventh day of April, A. D. 1908, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

848 United States Circuit Court of Appeals, Eighth Circuit,
December Term, A. D. 1907.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA, Appellee.

Appeal from the Circuit Court of the United States for the District
of Nebraska.

Mr. Howard Mansfield (Mr. R. S. Hall and Mr. Herbert C. Lakin
were with him on the brief) for the appellant.

Mr. John Lee Webster and Mr. Carl C. Wright (Mr. Harry E.
Burnam was with them on the brief) for the appellee.

Before Hook and Adams, Circuit Judges, and Carland, District
Judge.

Hook, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the circuit court for the dis-
trict of Nebraska dismissing the bill of complaint of the Omaha
Water Company to compel the city of Omaha to complete the
purchase of complainant's system of water works in accordance
with a contract giving the city an option to purchase, the exercise
of the option and an appraisal fixing the price to be paid. The
objection of the city is to the appraisal.

The installation of the water works was begun in 1880 by a
predecessor in title of the Omaha Water Company, the original
franchise ordinance having been adopted in that year in the exercise
of power granted by a Nebraska statute of 1879. Section 14 of the
ordinance provided that after the expiration of twenty years the city
should have a right to purchase the works at an appraised valuation
"ascertained by the estimate of three engineers, one to be selected
by the city council, one by the Water Works Company, and these two
to select a third." Nothing was to be paid for the unexpired fran-
chise of the company. The works were completed in 1883, and on
September 4 of that year an ordinance was adopted accepting the
works as a full and complete compliance with the obligations to
the city.

849 In 1903 the Nebraska legislature passed an act which in
effect required the city to buy or build a system of water
works. Consequently on March 2 of that year it was declared by
ordinance to be necessary and expedient for the city "to purchase
the system of water works operated by the Omaha Water Company,"
and that the mayor and council "so elect and determine to purchase
and acquire such water works by virtue of the rights inuring to said
city through the contract between said city and the grantors of said
water company, and as authorized and provided by section 14 of
ordinance No. 423". Ordinance No. 423 is the ordinance of 1880.

Thereupon the water board of the city, having been recently created by legislative act and invested with authority in the premises, nominated an appraiser and the nomination was confirmed by the city council. The company then named one and those two selected the third. These men were hydraulic engineers. Two of them lived in Chicago, Illinois, and one in Milwaukee, Wisconsin. On July 20, 1903, the appraisers organized by the election of one of their number as chairman and another as secretary. Their report which was submitted July 7, 1906, fixed the aggregate value of the property at \$6,263,295.49, a sum barely sufficient for the discharge of the outstanding mortgage bonds issued by the company including a small premium to be paid upon their call before maturity. The report was signed by but two appraisers. Appended thereto was the following, signed by the other who was the one selected by the water board and the city: "I do not concur in the above report, nor in the values as fixed therein." The water board whose jurisdiction had in large measure superseded that of the city council, thereupon declared that it rejected the appraisal. The company then tendered a deed conveying the system of water works and demanded the payment of the appraised value. Payment being refused, suit was brought by the company.

The city says the appraisal is void for several reasons, the two most important of which are: That the appraiser named on behalf of the city refused to concur, and that the appraisers were guilty of misconduct. It is also claimed that improper items of property and elements of value were included in the appraisal and that the deed tendered by the company embraced property which the city of Omaha had no power to acquire or operate because it lay beyond its corporate limits.

Did the refusal of one of the appraisers to concur defeat the appraisal? The rule is that when the subject of the inquiry or controversy is of a private character all entrusted with the power of ascertainment or decision must agree unless it is otherwise provided by the interested parties (*Hobson v. McArthur*, 16 Pet. 182, 192). But it is equally well settled that when the matter in question is of public concern, all being qualified and having assembled and acted, the finding or decision of a majority is a valid execution of the power. (*Colombia v. Cauca Co.*, 190 U. S. 524; *Grindley v. Barker*, 1 Bos. & P. 229; *King v. Beeton*, 3 Term 592; *Withnell v. Gartham*, 850 6 Term 388; *Gas Co. v. Wheeling*, 8 W. Va. 320; *Green v. Miller*, 6 Johns. 39; *Ex parte Rogers*, 7 Cow. 526; *Downing v. Rugar*, 21 Wend. 178; *Crocker v. Crane*, 21 Wend. 211; *People v. Nichols*, 52 N. Y. 478; *The People v. Walker*, 23 Barb. 304; *Young v. Buckingham*, 5 Ohio 485; *Patterson v. Leavitt*, 4 Conn. 50; *Eames v. Eames*, 41 N. H. 177, 181.) That the first of these rules is not applied where matters of public interest are involved is doubtless due in part to a question of its practical wisdom—to the fact that its application generally leads to continued controversy and litigation. The views of those whose interests are at stake are likely to be adopted and insistently maintained by the appraisers or arbitrators they personally select, and the chance of agreement and final disposition of the matter is not materially enhanced by the sub-

mission. On the other hand the rule that is applied in cases of public concern is in harmony with the plan of representative governments which move and act by majorities. Public officials are chosen, laws enacted, rights judicially determined and business transacted by majorities. The affairs of subordinate divisions of the state such as counties, townships and cities are conducted by local boards or bodies whose controlling and effective voice is that of the greater number of the members. The rule pervades almost every branch of the public service where power is lodged in the hands of several, and it is a distinctive recognition of the truth that the transaction of public business cannot wait for unanimity. All of the steps leading to the construction of the water works and the reservation of the right of purchase, from the original organization of the city itself down to the adoption of the ordinance of 1880, were manifestations of majority power. The legislative direction to the city to buy or build, its ordinance of 1903 electing to buy, the nomination of an appraiser by the water board and his confirmation by the city council were all expressions of the will of the majority. And if the city shall acquire the water works the levy and collection of taxes, the payment of the purchase price and the conduct of the business in the future are matters that will be committed to public bodies acting by the greater number of their members. And it may be observed that on the other hand the corresponding acts of the water company were the acts of a majority of the members of its managing board. The appraisal of the water works is an intermediate step in this long progression, and it would be strange indeed if by mere construction of law its validity should be held to rest upon unanimity of concurrence, a requirement long since rejected as impracticable and not suited to matters affecting public interests. Experience teaches that in cases like this the parties are seldom able to agree upon the value where the company is required by force of circumstances to part with the ownership of its property. It also teaches that appraisers are apt to be partisans of those who name them and that unanimous agreement is the rare exception. The provision of the ordinance of 1880 was intended to be a practical one and to be productive of an actual appraisal of the water works. It was not intended that

851 the appraiser selected by the city or the one selected by the company might at the last minute when all the work was done cause the appraisal to miscarry by mere refusal to join in the valuation found by the other two. As was said in *Colombia v. Cauca Co.*, *supra*: "Of course it was not expected that a commission made up as this was would be unanimous." The engineer named by the city acted with his associates through an expensive investigation extending over three years, and when the report was finally made up and signed he simply appended thereto the bare, unexplained statement that he did not concur in the report or in the values fixed. The water board then resolved to reject the appraisal and to name a new appraiser in its behalf though it cannot reasonably be anticipated that new appraisers would be more likely to agree unanimously. It was not contemplated by the ordinance of 1880 that either party, the city or the company, could at will arbitrarily defeat the appraisal contracted for, and yet in practical effect that

is what is contended. The case is not as though one of the appraisers resigned and left the board incomplete during the progress of its labors. All continued to the end; both the city and the company had the benefit of their experience and joint investigation, and the final valuation after conference and interchange of views sufficiently bears the impress of the one who dissented because he did not wholly have his way.

It is not improper to observe that until the report was made the three appraisers were regarded by all parties as composing a board or body invested with powers in their aggregate capacity. Immediately upon their selection they organized as a "Board of Appraisers" by the election of one of their number as chairman and another as secretary, and thereafter they constantly referred to themselves as a board. They were so addressed by counsel for the city when he outlined a method of procedure for their adoption. While the appraisal was in progress the water board and the city filed a bill in the circuit court against the appraisers and the company to secure authoritative directions as to the appraisal. In this bill of complainants, in the answer of the company and in the decretal order of the court there is constant reference to them as "the board" and the "board of appraisers." The popular conception of a board is that like tribunals in general it acts as a unit and speaks through a majority of its members.

The case of *Gas Co. v. Wheeling*, 8 W. Va. 320, is quite similar to the one at bar. The act incorporating the Wheeling Gas Company contained a provision that at the expiration of twenty years the city might if it so elected purchase the gas works at a price to be agreed on or to be ascertained "by the award in writing of three persons to be chosen, the first by the directors of said company, the second by the council of said city, and the third by the two thus chosen." The city having elected to purchase and the being a disagreement as to the price, the appraisers or arbitrators were selected. All three of them participated in the investigation and at the conclusion two of them signed the award. The third merely expressed thereon his dissent. The city tendered the price fixed, the company refused it, the city deposited the money

852 in bank to the order of the company and took possession of the works. In an action by the company to regain possession was held among other things that the matter was of public interest and the award was valid.

In *People v. Nichols*, 52 N. Y. 478, there was an appropriation by the state for the purchase from a private person of certain relics, to be paid only upon the certificate of three persons named in the act that the relics were in their opinion genuine and that it was desirable in their judgment that they be placed in the museum of the state library. The parties named having met and inspected the relics, two of them signed the certificate and recited thereon that the third refused. Justice Peckham, in delivering the opinion of the court, said:

"In my judgment, by the well-settled rule at common law that power would have been legally exercised by the signature of the

of the three to the certificate when all three assembled to pass upon the question. The only answer specially urged against this rule is that it solely applies 'to matters of public concern;' that 'as to matters of private concern,' as this is claimed to be, all must join to make a valid execution of the power * * *

"Then is this a matter of private concern? We are all of opinion it is not. The cases referred to by the respondent cannot fail to establish his doctrine. They hold that arbitrators, to determine controversies between individuals, are engaged in matters of private concern. But where appraisers act between individuals and the State, it is a matter of 'public concern,' and a majority act as a whole, when all have met. In the case at bar the legislature desired to purchase, upon certain terms, what they regarded as of interest and value to the public. It was a question between an individual and the state. This would seem, then, to be plainly a matter of public concern. This certificate, therefore, would have been legally given at common law when signed by a majority."

Colombia v. Cauca Co., 190 U. S. 524, was a bill by the Republic of Colombia to set aside an award of a special commission settling in favor of the Cauca Company a controversy over a concession to build and operate a railroad, and accompanying land grants, etc., and a claim that the concession and grants had been forfeited. The commission was composed of three members, one selected by each party to the controversy and the third by the Secretary of State of this country and the Colombian minister at Washington. A few days before the expiration of the time limited for their action, and when little remained to be done except to sign the award, the Colombian commissioner resigned and the other two made the award. Colombia said the award was void because made by but two of the three commissioners. Several reasons were given by the Supreme Court for sustaining the award, among them one that the matters involved were of public concern.

853 The city contends that the contract with the water company for the acquisition of the water works is not a matter of public concern and it cites *Illinois Trust & Savings Bank v. Arkansas City* (22 C. C. A. 171, 76 Fed. 271), and similar cases to the effect that such contracts are of a private or business nature. But that was said in contradistinction to acts done in the exercise of the legislative and governmental powers of municipalities. It has never been held, and never can be with reason, that a contract between a water company and a city for the acquisition by the latter of a system of water works is not a matter of public concern. By common consent a water company is called a public service corporation and is therefore given the use of the public streets for its mains and pipes; its system of water works constitutes a public utility of vital importance to the health and well-being of a city and its inhabitants; the city of Omaha was invested with power to appropriate private property for the public use in constructing and operating waterworks of its own; the rates and charges of water companies are subject to

regulation by the state within constitutional limitations, and this on the theory that the property and operations of such a company are affected with a public interest. To say that the matters submitted to the appraisers in this case were not of public concern is to disregard the essential nature of things. It is true that in *People v. Nichols* (52 N. Y. 478), a state law provided for the purchase of the relics, and in *Gas. Co. v. Wheeling* (8 W. Va. 320), the original authority to purchase the gas works was found in the statute incorporating the company, but the proximity or remoteness of a state statute does not determine the character of the subject matter, whether of private or public concern, though were it otherwise the fact remains that the reservation by the city of the right to purchase at an appraised value was a condition authorized by state statute and when the election was made the city was acting under direct mandate of the Nebraska act of 1903. Considering the character of the parties, the nature of the contract, the property in question and the end to be attained, the matter involved in the appraisal was one in which the public was greatly interested, and all the appraisers having acted two of them could fix the value.

The city also claims that the appraisal is void because of misconduct of the appraisers. The chief complaint in this respect is that the water company sent its books to Cincinnati, Ohio, where the appraisers held a meeting, and thence to Chicago, Illinois, where they had them examined by an audit company selected by them for the purpose, and that the city was not given access to the books nor permitted to examine witnesses upon their contents. Emphasis is placed on the fact that for more than a year previously the appraisers held open sessions and received oral testimony from witnesses who were examined and cross-examined by counsel, and it is asserted that the books were received after the inquiry had been closed. The company contends that the action of the appraisers was consistent with the advisory instructions given them when they entered upon their duties and also with the character of the proceeding in their charge. At the beginning of their inquiry the appraisers were addressed by counsel upon their method of procedure. The city attorney said:

"As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the city of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the city of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board,

but simply for its advice and information in the matter. It is not the opinion of the city of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, [to] whose judgment the question of value must be submitted upon the examination of the property."

That the appraisers at first received evidence in the presence of counsel did not irrevocably commit them to a continuance of that course, and counsel are in error in saying the inquiry was closed when they ceased doing so. It was distinctly announced at the time by the chairman of the board that much more information must be sought than that already presented and "the board will undoubtedly wish to call on the city and the company for special information as to details the necessity for which will develop as the work proceeds." What they did with the company's books was not exceptional. In performing their duties the appraisers did much investigating in the absence of the parties, doubtless believing that their course of procedure was largely within their discretion, and it cannot be doubted that it was, in view of the character of the submission for appraisal and the instructions given them at the beginning. There is no ground for questioning their entire honesty and sincerity. The books were not submitted, audited or examined at the instance of the company, nor did it offer them in evidence as such act is usually understood in a legal proceeding. The sending of the books to Cincinnati and Chicago was at the instance of the appraisers and the only participation by the company in the examination was to explain the method of keeping them. All three appraisers participated in what was done; there was no concealment. We have the bare fact that the books were sent and examined; what, if any use was made of the information contained in them does not appear. We think undue importance

855 is given this matter merely because of the adventitious fact that the books were shipped to Cincinnati and thence to Chicago. If the appraisers had gone into the office of the company at Omaha and demanded the production of all of its records for examination by themselves or by an expert bookkeeper selected by them without participation by either the city or the company it is doubtful any complaint would have been made. It was not intended by the submission to three expert engineers for appraisal that attorneys should always attend them and participate in every inquiry they made to secure information, nor does that seem to have been the view of counsel before the appraisal was made.

It may at once be admitted that were this an arbitration the examination of the books in the absence of counsel would have defeated an award. But there is a clear distinction between an appraisement by valuers and an arbitration, though the latter term is frequently but incorrectly applied to both proceedings. An arbitration presupposes a controversy or a difference to be tried and decided, and the arbitrators proceed in a judicial way, sometimes as an adjunct to a court of justice. Their investigation is in the nature of a judicial inquiry and rules of procedure must be strictly observed or their award will be void. On the other hand an ap-

praisal or valuation is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate a controversy but to avoid one. Thus, if A. and B. contract, the former to sell and the latter to buy, certain property at the value thereof as fixed by X, Y and Z, the latter are appraisers, not arbitrators, and are not governed in their proceedings by the rules relating to arbitration. As long as appraisers act honestly and in good faith they have a wide discretion as to their methods of procedure and sources of information. Generally speaking, they may inform themselves in any way that an honest seeker for the truth would adopt. While there are many cases in which no distinction is made between the two proceedings, in most of them it will be found either that the term arbitration was used in the general sense of a submission of some matter to third persons for ascertainment or decision or that some feature peculiarly the subject of arbitration was involved. Sometimes the doubt whether the submission is in arbitration or appraisal is determined by the character of those to whom it is made and the method of their selection. Thus in *Bottomly v. Ambler*, 38 L. T. 545, 26 W. R. 566, it was held to be an appraisal because two of the men selected were agents of the interested parties and all three were experts in the matter to be determined. When the attention of the courts has been directed to the distinction it has been generally recognized both in England and in this country. *Kelly v. Crawford*, 5 Wall. 785; *Collins v. Collins*, 26 Beav. 306, 28 L. J. Ch. 184; *Bos v. Helsham*, 4 H. & C. 642, 36 L. J. Ex. 20, 15 L. T. 481; *In re Wilson and Green*, 56 L. J. Q. B. 530, 55 L. T. 864; *Guild v. Railroad Co.*, 57 Kan. 70; *James v. Schroeder*, 61 Mich. 28; *Railway v. Moore*, 64 Pa. St. 79; *Norwich Gas, etc., Co. v. Norwich*, 76 Conn. 565; *Palmer v. Clark*, 106 Mass. 373; *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *Wurster v. Armfield*, 175 N. Y. 256; *Conference of M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839.

In *Railway Co. v. Moore*, 64 Pa. St. 79, 91, it was said:

"An award is the judgment of a tribunal selected by the parties to determine matters actually in variance between them—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterwards, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons. * * * Nor is such an appraisement subject to the strict rules governing arbitrations and awards. * * * It would not be necessary that the appraisers should decide upon evidence heard in the presence of the parties. They could decide, and indeed would be expected to fix the value of the articles, upon their own knowledge of the subject, though doubtless they might seek information from other quarters."

In *Palmer v. Clark*, 106 Mass. 373, 389, the court said:

"A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisement of property

and the like especially when such reference is one of the stipulations of a contract founded on other and good considerations differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive."

The other complaints of the conduct of the appraisers are disposed of by what has been said.

It is also contended that the appraisal includes property which the city did not contract to purchase and was without power to own. This refers to the extensions of the water works system beyond the corporate limits of Omaha into the city of South Omaha and the towns of Dundee and Florence and the territory known as East Omaha. All these immediately adjoin the city of Omaha; Florence on the north, East Omaha on the east, South Omaha on the south, and Dundee on the west. South Omaha, Dundee and Florence have separate municipal governments under the laws of Nebraska. In 1880, when the installation of the system of water works was commenced Omaha was a city of about thirty thousand inhabitants, but it grew rapidly and at present contains 125,000 or more. In South Omaha, which was incorporated in 1886 and in 1903 contained more than 31,000 people, there are located extensive industries in the con-

duct of which residents of the larger city are interested and 857 which require great quantities of Water. These two cities are connected by continuous streets traversed by continuous street car lines. In the year 1900 Dundee had 400 inhabitants and Florence 688. All these cities and towns are practically one metropolitan city, and it needs no foresight to predict their ultimate consolidation; indeed the laws of the state now provide that "any city, town or village adjoining any city of the metropolitan class may be annexed or merged with such city of the metropolitan class" whenever a proposition therefor has been approved by the majority of the votes in each city, town or village cast on such proposition at a general election (Laws 1905 ch. 14 sec. 2). Obeying the law of its existence and responding to the necessities of the public the water company extended its mains and pipes throughout the city of Omaha and into these adjacent municipalities. That it did so for profit is but part of the proposition; that it was its duty to do so conclusively appears from a survey of the situation. Florence, Omaha and South Omaha are on the west bank of the Missouri River. It was recognized in the beginning that the water supply for Omaha would have to be taken from the river and considerations of public health imperatively demanded that it be taken from a point far enough up the river so that it would not be contaminated by the sewage of the cities. With this in view an intake, pumping station and settling reservoirs were permanently located about nine thousand feet north of the north line of the city of Omaha and at present they constitute the principal source of supply of the water that is furnished all the cities and villages. The water works of the company is one complete,

uniform system planned and designed to serve the municipalities and their inhabitants as one aggregate community. It is incapable of segregation into parts so as to make a separate and independent system for each city and town. There is no pumping station in East Omaha, Dundee or South Omaha. A refusal of the company to extend its mains and pipes into these communities would have been indefensible. It would have resulted in depriving the villages of fire protection and water for domestic consumption since the cost of a separate system of water works would be prohibitive to a community of a few hundred inhabitants, especially to Dundee because of its location on the heights west of Omaha. For South Omaha pumping works would have had to be installed at the river bank north of Omaha and flow lines run through the streets of the latter city, involving a wasteful and unnecessary expenditure of money and an unjust burden upon the people and the industries in which both cities are interested. The growth of the system of water works throughout the larger city and into these suburban and adjacent communities was a natural one, and considerations of justice not only to the company but also to the inhabitants of the small communities require that no dismemberment of the system be made unless the law imperatively requires it.

The city of Omaha says it is willing to purchase the proper works within its corporate limits and also the intake, pumping station and reservoirs at Florence, with the connecting mains, but it is not willing to purchase the distribution systems in Florence, East Omaha, South Omaha and Dundee. We may dismiss from further consideration the distribution system in Florence because the duty to maintain and operate it was one of the conditions upon which that village granted to the water company the right to install its works there and use its public grounds. To continue the maintenance and operation is a burden which must accompany the ownership of the supply works. Two reasons are assigned for cutting off and excluding those parts of the system lying in East Omaha, South Omaha and Dundee. First, that the city has no power to acquire them since they lie without its corporate limits; and second, if it has the power it has not exercised it.

We think if the statutes of the state are construed in the light of conditions to which they were intended to apply they disclose ample authority in the city to own and operate the entire system of water works including the parts beyond its boundaries. In 1880 when the franchise was granted the city had power (Laws 1879, p. 99, sec. 7) "to erect, construct and maintain water works either within or without the corporate limits of the city * * * and to contract with and procure individuals or incorporations to construct and maintain water works on such terms and under such regulations as may be agreed on." By virtue of this authority the ordinance of 1880 was adopted. In 1897 (Comp. Laws 1901, c. 12a, sec. 27) Omaha was given power "to appropriate private property for the use of the city for * * * water works, including mains, pipe lines and settling basins therefor, the right and power * * * to extend a distance of ten miles from the corporate limits

of the city," also "power to appropriate any water works system, plant or property already constructed to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs, and all appurtenances reasonably necessary thereto and a part of or connected with said system, plant or property, and franchises to own and operate the same if any." This law was in force in 1903 when the city made its election to purchase. The act of 1903 (Laws 1903, ch. 12, p. 66) made municipal ownership compulsory, and the city was directed to construct or purchase. Section 3 commanded the mayor and council of the city "to take the necessary steps to acquire such water plant under the powers granted to such city or by virtue of any rights inuring to such city through contract or otherwise." Section 10 provided that the authority and powers of the water board should extend as far beyond the city limits as it might deem necessary, not exceeding ten miles. A provision of a prior law granting power to the city to construct or purchase water works within or without the city was retained but so amended as to adapt thereto the powers and functions of the

859 water board (sec. 135). There were thus three methods provided by law by which the city could secure a system of water works: First, by its own construction in the city and within ten miles of its exterior limits, exercising in aid thereof the power of eminent domain; second, by appropriating a system already completed whether lying wholly within or partly within and partly without the city but within the ten mile limit; and third, by purchasing an existing system lying within or without the city if the right to do so had been reserved to the city by contract. But, however acquired, the jurisdiction of the water board in respect thereof was supreme and extended a distance of ten miles beyond the city limits. We do not think this studied and persistent reference to the territory beyond the city limits is wholly satisfied by saying it was a mere provision for the establishment of the supply works. Doubtless that was in mind but it was a fact publicly known that the Omaha system extended into the adjacent communities and a custom thereby secured that constituted an important part of its value of which a purchaser would naturally desire to avail himself, and the later laws of the state, applying as they did exclusively to the city of Omaha, were framed in view of that known condition. The legislature was not blind to the history of American cities, their rapid growth in population and the continual expansion of their boundaries, nor to the fact that while there may be clustered around a growing city smaller cities and villages they really constitute one center of population with a community of interest, and that sooner or later the arbitrary lines of division will appear. Nor can it be conceived that the legislature intended that these smaller municipalities should be subjected to the oppressive burden of maintaining separate means of procuring that which is so vital to health and safety as a supply of water. In other respects also the laws affecting

Omaha had regard to its future growth and development. Authority was given (Comp. Laws 1901, ch. 12 a, sec. 101 b) to acquire lands within three miles of the city limits for public parks, parkways and boulevards, and it was provided that if the lands acquired were within the corporate limits of any other city or village such other city or village should cease to have jurisdiction over them.

We are also of the opinion that when the city made its election it elected to purchase the entire system of water works. The ordinance of 1880 by which the franchise was granted related to a system of water works "within and adjacent to the city of Omaha, in Douglas County, state of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof with water." The ordinance required that the pumping capacity of the works keep pace with the growth of the city and that in a practical sense meant not merely from day to day but implied the exercise of business foresight in making reasonable provision for the future. The right of purchase reserved by section 14 of the ordinance refers of course to the system of water works designed for supplying the city of

Omaha with water, but it includes everything fairly appurtenant to the system as a whole. Section 11 provides that upon failure to comply with the terms of the ordinance all rights thereunder shall be forfeited and the city of Omaha shall become vested with the ownership "of said water works and property appurtenant thereto and connected therewith subject to the payment of a just compensation therefor to be ascertained as provided in section 14." In 1896 the city of Omaha commenced a suit to forfeit the franchise granted by this ordinance and to obtain title to the system of water works. By the averments of its bill and references to the mortgages on the property it charged that all of the property of the company in Douglas County, Nebraska, specifically including that in Florence and South Omaha was absolutely essential to the operation of the water works, to the performance of the public duty of the defendant company and to the fulfillment of its contract obligations to the city; and the city asserted its right "to take possession and control of the said water works plant, and all the property connected therewith or appertaining thereto." The ordinance adopted under the mandate of the act of 1903 declared it necessary and expedient for the city to purchase "the system of water works operated by the Omaha Water Company" and recited that the election to do so was by virtue of the provisions of section 14 of the ordinance of 1880. The declaration and recital were in effect an assertion that the right of purchase under that ordinance embraced the entire system operated by the company. At the first meeting of the appraisers the chairman of the water board stated they wanted and expected to purchase the entire property if they could possibly do so, but in view of the question as to the power of the city they wanted a separate appraisal of the outlying properties. The water company has always protested against the dismemberment of its property. In 1905 the city and the water board sued the company and the appraisers in the court below to obtain authoritative instructions for the appraisal then in progress. After a trial an order was made

that the property be appraised as an entirety and also in parcels with a separate statement of certain elements of value, so that the report would be available whatever the ultimate decision of the rights of the parties might be. The trial judge was of opinion that the election ordinance of 1903 contemplated the purchase of the entire system, though he thought it doubtful that the ordinance of 1880 in which the right of purchase was reserved was so comprehensive.

A contract of sale and purchase between the company and the city arose in 1903 which was not subject to impairment by subsequent legislation; but it may be well to notice some provisions in the act of 1905 adopted in anticipation of municipal ownership and operation of water works (Laws 1905 p. 175). By that act the water board was authorized to contract with any adjacent municipality to supply it with water for public or private purposes or with any person, copartnership or corporation engaged in that business. It is said in effect that the express grant of power to contract with an

adjacent municipality or with a corporation engaged therein
861 in supplying water is an implied denial of power to furnish water direct to the inhabitants and therefore the legislature intended the outlying distribution systems should not be acquired by Omaha but should be left on the hands of the company to hold or sell if the smaller towns chose to buy. In other words the contention is that Omaha has no power to own or operate the pipes and mains beyond its limits but may contract to furnish water to the owner whether it be the company or an adjacent municipality. Ordinarily power in Omaha as owner of the system within its limits and the supply station at Florence to contract with an adjacent municipality to supply it with water for public and private purposes would warrant the adoption of either of two methods: first, through a distribution system owned by Omaha itself in the adjacent territory, in which event it would deal directly with the consumers, public and private, as it would within its own boundaries; and second, the delivery, say at the city limits, into a distribution system owned either by the adjacent municipality or by the water company. The fact that the power granted was to contract with an adjacent municipality would not necessarily exclude the first of these because the furnishing of water for both public and private consumption is invariably done under contract with the municipality in which the use is enjoyed. But the provision in the act for compensation to Omaha for this service would seem to preclude any direct relation between it and the consumers in the adjacent communities and to imply that it should deliver the water in quantity, leaving to others the duty of distribution and the relations with consumers the different classes of whom are served at different rates. The provision referred to requires that all water furnished by Omaha for use in adjacent municipalities shall be measured by meter at the expense of the adjacent municipality or company, and the rate per thousand gallons *"shall not be less than the gross average income per thousand gallons for all water"* used in Omaha including a fixed allowance for hydrant service therein. This seems to contemplate a whole-

sale, flat rate, and settlement only with the adjacent municipality or the company as the case may be.

If the act of 1905 affected the fixed contract relations between Omaha and the company a result would follow so remarkable and so inequitable it is difficult to believe it was intended. If Omaha now bought only the property within its borders and the supply works and left the outlying distribution systems on the hands of the company the latter would either have to sell them to the adjacent municipalities, or to Omaha if hereafter invested with power, at their own figure, or continue business under such conditions as would practically destroy the value of its property. In the latter case it would be confronted with the problem of procuring a water supply for the smaller communities since the existing facilities would be owned by Omaha. Of course separate, independent supply works on the river north of Omaha, the only feasible location, would be out of the question. Besides the disproportion of cost to the amount of consumption the plan would
862 not be practicable unless Omaha granted the right of way for flow lines through her streets. The alternative would be to apply to Omaha for water. If Omaha furnished the water, say, for example, to be used in South Omaha, the only property it would employ in that service would be its supply works at Florence and its flow lines or mains running thence to and through the city to the southern limits thereof where delivery would be made into the distribution system in South Omaha still owned by the company; yet under the act of 1905 it would charge the company a rate per thousand gallons *not less than the gross income per thousand gallons derived by it from all water furnished within its own limits, including the estimate for hydrant service.* In this gross income would be not only cost of maintenance and operation but also interest, return or profit upon Omaha's entire investment. The rates paid by consumers in Omaha which would go to swell the gross income would be for water delivered at their doors, but the water for South Omaha would be delivered on its northern boundary and remain to be distributed to consumers through the mains and pipes of the company. To enable the company to receive cost of maintenance and operating expenses saying nothing of returns on its investment in South Omaha it would have to charge more than it paid for water; but the rate the company would be required to pay under the act of 1905 is not less than the average of rates to public and private consumers in Omaha, and it is known that the ordinance of South Omaha under which the company is authorized to do business there provides that the Omaha rates shall prevail in that city. The company could not charge more than it would have to pay. It thus appears that the thirty-one miles or more of mains and pipes in South Omaha regarded as a distribution system and not as so much iron would be rendered worthless in the hands of the company. The situation to which the act was directed was quite complicated and it is preferable to believe some other purpose was in view to express which the language was unhappily chosen.

When the report of the appraisers came in the water board adopted a resolution rejecting it, and it is claimed that the act of 1905 conferred authority upon the board to do so. But in 1903 the city, proceeding in accordance with the act of that year, availed itself of the right reserved in the ordinance of 1880 by electing to purchase; and appraisers were duly chosen and were engaged in the performance or their duties when the act of 1905 was passed. The continuing offer of the company to sell arising from the acceptance of the ordinance, and the election of the city to buy made a contract binding upon both parties. The provision for fixing the price by appraisal was a valid one and it was recognized by the act of 1903 which authorized the water board to nominate an appraiser for confirmation by the city council. There was no withdrawal from the appraisal proceedings. The appraisal being valid the legislature could no more authorize the water board or the city to reject it than it could authorize the abandonment of the contract

of purchase itself. Nor can an impairment of the obligation
863 of the city to complete the purchase be effected by prescribing new conditions in respect of the voting of bonds. (*Sala v. New Orleans*, 21 Fed. Cases 221, Case No. 12246, 2 Woods 188.)

The ownership by a city of a water works system extending beyond its limits is not an unusual thing. The legislative act in the Kansas City case (*Laws Missouri*, 1873, p. 286, sec. 1) provided that the city might acquire and use for that purpose property "within and without the corporate limits of the city and also in the State of Kansas," and (sec. 22) that the city might grant to any person or corporation the right of construction, reserving the privilege of purchase. When the purchase clause was invoked some twenty years later the company's distribution system extended beyond the city limits and the main supply works were in another state. The difficulties suggested by counsel here are not greater than those before Mr. Justice Brewer under whose judicial supervision the purchase by the Missouri city was effected (*National Water Works Co. v. Kansas City*, 10 C. C. A. 653, 62 Fed. 853; *National Water Works Co. v. Kansas City*, 65 Fed. 691). In a transaction of this magnitude there will always be encountered minor obstacles that will readily yield to business methods. What the parties cannot agree upon the trial court has full power to determine according to principles of right and justice. We refer here to such contentions as that there are two or three properties in the city of Omaha belonging to the company but not needed in the business, and also that there are supposed defects in its title to other properties. The latter are not of great importance in comparison with the magnitude of the entire system. The property not needed was appraised separately and it can be excluded from the sale, and the trial court can determine whether the title to other properties is defective. It is not necessary that the title of the company to all the lands upon which its works are built or through which its pipes are laid should be a fee simple, perfect in every particular and subject to no criticism. An irrevocable license, for instance, would be sufficient, or a title

based upon prescription. If, however, there should be found substantial defects opportunity should be given the company to remedy them, and if it is unable to do so the parts of the property so circumstanced can be valued and the purchase price abated accordingly. It would be expressing too narrow a view to say that an appraisal of a great system of water works under a contract of purchase must fail because the title to a small part not vital to the integrity of the system was afterwards found to be defective. That the deed tendered by the company was not such as the city was required to take is immaterial. It is sufficient that the company was able, ready and willing to do what might lawfully be required of it. At some time during the progress of the cause in the trial court the trustees of the mortgages should be made parties to the end that the precise amount of outstanding bonds may be ascertained and paid and the liens discharged concurrently with payment by the city of the purchase price. Doubtless the company will have to use the proceeds of sale in paying its mortgage indebtedness. Or if an arrangement is desired such as was made in the Kansas City case whereby the mortgages are assumed by the city, and the company released from liability, the presence in the case of the trustees would facilitate it.

The decree is reversed and the cause is remanded with direction to proceed to decree in accordance with the views expressed in this opinion.

Filed April 7, 1908.

865

(Decree.)

And on the seventh day of April, A. D. 1908, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1907.

TUESDAY, April 7, 1908.

No. 2683.

OMAHA WATER COMPANY, Appellant.

VS.

THE CITY OF OMAHA.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in

this cause, be, and the same is hereby, reversed with costs; and that the Omaha Water Company have and recover against the City of Omaha the sum of One Thousand Eighty-eight and 75/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to proceed to decree in accordance with the views expressed in the opinion of this Court.

April 7, 1908.

866

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals (except the transcript of the record from the Circuit Court of the United States for the District of Nebraska), in a certain cause in said Court wherein the Omaha Water Company is Appellant and The City of Omaha is Appellee, No. 2683, as full, true and complete as the originals of same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

867 United States Circuit Court of Appeals, Eighth Circuit.

No. 2683.

OMAHA WATER COMPANY, Appellant,

vs.

THE CITY OF OMAHA.

Appeal from the Circuit Court of the United States for the District of Nebraska.

It is hereby stipulated by and between the parties to the above entitled cause that the copy of the record used upon the application for a Writ of Certiorari and now on file in the Supreme Court of the United States shall be taken as a return to the Writ of Certiorari issued out of the Supreme Court on June 1st, 1908, and the Clerk

of this Court shall transmit a certified copy of this stipulation with his return to the said writ.

June 24, 1908.

HOWARD MANSFIELD,
R. S. HALL,

Attorneys for Appellant.

JNO. L. WEBSTER,
CARL C. WRIGHT,

Attorneys for Appellee.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2683. Omaha Water Company, Appellant, vs. The City of Omaha. Stipulation as to Return to Writ of Certiorari. Filed Jun- 25, 1908, John D. Jordan, Clerk.

868 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Omaha Water Company is appellant, and The City of Omaha is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby com-
869 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of June, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

870 [Endorsed:] 390-08/21,167. File No. 21,167. Supreme Court of the United States. No. 764, October Term, 1908. The City of Omaha, vs. Omaha Water Co. Writ of Certiorari. Filed Jun- 25, 1908. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Omaha Water Company, Appellant, vs. The City of Omaha, No. 2683, is a full, true and complete transcript with all of the pleadings, proceedings and record entries in said cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in St. Louis, Missouri, this twenty-fifth day of June, A. D. 1908.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

871 [Endorsed:] File No. 21,167. Supreme Court U. S. October Term, 1909. Term No. 159. The City of Omaha, petitioner, vs. Omaha Water Co. Writ of certiorari and return. Filed June 27th, 1908.

The first part of the book is devoted to a description of the physical features of the United States. It begins with a chapter on the geography of the continent, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce. The second part of the book is a history of the United States from its first settlement to the present time. It begins with a chapter on the discovery of the continent, and then proceeds to a detailed account of the various wars and revolutions. The author describes the political and social changes that have taken place, and also discusses the progress of science and literature. The third part of the book is a description of the present state of the United States. It begins with a chapter on the population, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce.

The fourth part of the book is a description of the future of the United States. It begins with a chapter on the progress of science and literature, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce. The fifth part of the book is a description of the present state of the United States. It begins with a chapter on the population, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce.

The sixth part of the book is a description of the future of the United States. It begins with a chapter on the progress of science and literature, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce. The seventh part of the book is a description of the present state of the United States. It begins with a chapter on the population, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce.

The eighth part of the book is a description of the future of the United States. It begins with a chapter on the progress of science and literature, and then proceeds to a detailed account of the various states and territories. The author describes the climate, soil, and natural resources of each region, and also discusses the progress of agriculture and commerce.

Office Supreme Court
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MAY 11 1901

JAMES H. McKEE

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

VS.

No. ~~704~~

OMAHA WATER COMPANY,

*Respondent.*Motion for Writ of Certiorari.

Comes now the City of Omaha and moves this Honorable Court that it shall by *certiorari* or other proper process directed to the honorable, the judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said court to certify to this court for its review and determination a certain cause in said United States Circuit Court of Appeals for the Eighth Circuit, lately pending, wherein the respondent, the Omaha Water Company was appellant, and your petitioner, the City of Omaha, was appellee, No. 2683, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in the said United States Circuit Court of Appeals for the Eighth Circuit.

John Lee Webster
Carl C. Wright

Counsel.

Office Supreme Court

FILED

MAY 11

JAMES H. MOX

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

vs.

OMAHA WATER COMPANY,

Respondent.

No. ~~100~~ 7

PETITION FOR WRIT OF CERTIORARI.

JOHN LEE WEBSTER,
CARL C. WRIGHT,
HARRY E. BURNAM,
Attorneys for Petitioner.

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

VS.

OMAHA WATER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, the City of Omaha, represents that this is a suit in equity brought by the *Omaha Water Company v. The City of Omaha* in the Circuit Court of U. S., for District of Nebraska and appealed to U. S. Circuit Court of Appeals for Eighth Circuit to compel the city to purchase the entire system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence, for the sum of \$6,263,295.49. Said valuation was the result of an award arrived at under an election by the city to purchase, but which award was signed by two of the appraisers and not concurred in by the third appraiser. The said award was made under a contract between the city and the Water Company which the United States Circuit Court of Appeals has adjudged to be a public as distinct from a private contract.

The matters involved are of great public interest and importance to the 175,000 people living in said cities and

towns, and questions which to many of said citizens are of grave and serious concern for reasons to be stated.

It is a case which presents questions of law about which there is serious conflict in the decisions between the different courts, state and federal, and between the federal courts. In one turning point in the case the Circuit Court of Appeals, between these same litigants, has handed down two opinions inconsistent with each other, one holding the contract between the city and the Water Company to be a public contract, and the other holding the same contract to be a private contract, and on these conflicting and contradictory constructions of the said contract, rendered judgment against the city of Omaha in each case.

The fundamental and primary objections to the award are as follows:

(1) That the award is void because not concurred in by the three appraisers, as required by the terms of Section 14 of Ordinance 423.

(2) The award is void by reason of misconduct of the Omaha Water Company and the Board of Appraisers in secretly and privately examining the books of the Water Company in the City of Cincinnati, Ohio, more than a year after the public taking of testimony had been closed and the case submitted, and which said secret and *ex parte* examination of the books of the Water Company was made against the protest of the City of Omaha and under an agreement by which the appraisers were to receive the said evidence and not disclose the same to the adverse party, and which said books contained material evidence bearing upon the "going value" of the water works, and also upon the cost of the construction and the purchase prices of material, including water mains and pumping engines.

(3) That the said award is void in that it includes extensions of the water works in the outlying municipalities used for the sole purpose of supplying outside municipalities with water, and which were not constructed under any franchise contract or authority conferred upon the Water Company by the City of Omaha, and that the City of Omaha was, and is, without power to appropriate money, levy a tax or issue bonds to pay for the purchase thereof.

Your petitioner further represents the material and important facts to be that in 1880, the City of Omaha by an Ordinance, No. 423, and amended by Ordinance No. 430, entered into a contract with a predecessor of the Omaha Water Company for the construction of water works in the City of Omaha to supply the City of Omaha with water for fire protection, public and domestic use. The said Ordinance by Section 14, reserved to the City of Omaha the election to purchase the water works at any time after twenty years "at an appraised valuation which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, these two to select a third."

In 1903, the City of Omaha, by an Ordinance, elected to purchase the water works under the said provision of Section 14 of Ordinance 423, and appraisers were appointed as provided in said Section 14, to-wit: one by the City of Omaha, one by the Omaha Water Company, and these two appointed a third.

The three appraisers organized as a board of appraisers July 20, 1903, and began their sittings in the City of Omaha as an open, public body, gave notice to the respective parties of their meetings, and the respective parties appeared by their attorneys before the said board of appraisers and formally produced and examined wit-

nesses under oath, and produced documentary evidence, and such manner of producing and receiving evidence continued from time to time until the 31st day of December, 1904, at which time the offering of evidence was concluded. The case was then argued orally and upon printed brief by the attorneys for the respective parties, and taken under advisement by the board of appraisers.

February 7, 1906, the appraisers held a meeting in Cincinnati, Ohio, of which notice had been given to the Water Company but no notice of which was given to the City of Omaha. At the time of the said meeting and pursuant to a written request, signed by one member of the board of appraisers, the Omaha Water Company shipped from the City of Omaha to Cincinnati, its books of account covering its business from 1896 to 1905, being some thirty volumes and weighing several hundred pounds.

At said time, Mr. Fairfield, the manager, and Mr. Stockton Heth, the treasurer of the Omaha Water Company, also went to Cincinnati, and the said Fairfield, as manager of the Omaha Water Company, then and there personally appeared before the board of appraisers and presented the said books for the private and personal examination of the board of appraisers, but with the understanding between the Water Company and the board of appraisers that the City of Omaha should not have an opportunity to see or examine said books or to be informed of their contents.

The attorney for the City of Omaha incidentally learned of the shipment of the said books of the Omaha Water Company to Cincinnati for the purpose of said secret *ex parte* examination, and thereupon the said attorney for the City of Omaha wrote and transmitted to the chairman of the board of appraisers a protest against this secret and *ex parte* examination of the books.

When the manager of the Omaha Water Company appeared before the board of appraisers with the said books, the said letter from the City Attorney was presented to him for his perusal and asked what he had to say in reply to it. Thereupon the manager of the Water Company insisted that the board of appraisers had a right to examine the said books to obtain therefrom such information as the books contained, to be used in fixing the value of the water works, and protested against any examination of the said books by the City of Omaha, and insisted that the said examination should be private and *ex parte*, and that it was none of the business of the City of Omaha what use or examination the board of appraisers made of the said books. Thereupon the board of appraisers accepted the said books, proceeded to make an examination thereof, and subsequently transmitted the said books to the City of Chicago and employed an audit company to make a report therefrom to the board of appraisers.

At the instance of the chairman of the board of appraisers, Stockton Heth, the treasurer of the Water Company, went from Cincinnati to Chicago to give such assistance to the audit company as it desired in preparing its said report, and while in Chicago had several interviews touching the subject matter with the chairman of the board of appraisers.

A report was made to the board of appraisers by the audit company, but which report was not submitted to the inspection of, nor its contents disclosed to the City of Omaha. All these matters and things were conducted with the understanding between the Water Company and the board of appraisers that the City of Omaha should not be permitted to know any of the matters or things appearing in the said books or in the said report.

Your petitioner further represents that two of the members of said board of appraisers lived in the City of Chicago and the other lived in the City of Milwaukee, and no reason was assigned for holding this *ex parte* meeting in the city of Cincinnati, February 7, 1906, at a date more than one year after the public taking of testimony had been closed, arguments made and case submitted. In truth and in fact the board of appraisers could have met in the City of Omaha and then and there have examined the books of the Water Company in said city as well as to have had this secret meeting in Cincinnati, so far as your petitioner is informed and believes, unless it be that it was desired to have the examination of the books in the City of Cincinnati to avoid the discovery thereof or any interference therewith by the City of Omaha.

Your petitioner further avers that by reason of the premises above stated, the Omaha Water Company and the board of appraisers were guilty of such misconduct as renders the award void and deprives the City of Omaha of a "square deal" in the premises.

Your petitioner further avers that on the 7th day of July, 1906, two of said appraisers signed an award fixing the valuation of the property of the Omaha Water Company at the sum of \$6,263,295.49, and the third appraiser refused to concur in said award but added thereto, over his signature, the words, "I do not concur in the above report, nor in the values as fixed therein." That up to the time of the final signing of the said award, all the parties in interest, including the board of appraisers, understood and acted on the theory that the clause in the contract under which the election to purchase was made required the valuation of the water works to be determined by the joint concurrence of all three appraisers. It

was only when it was ascertained at the last moment that the three appraisers could not agree that two of the appraisers handed down the award in controversy.

Your petitioner further avers that the award is void and should not be enforced for the reason that it includes not only the water works used for supplying the City of Omaha with water, but includes such parts of the water works system as have been extended into and used solely and only for the purpose of supplying the municipalities of South Omaha, East Omaha, Dundee and Florence with water for fire protection, public and domestic uses.

Your petitioner further avers that when in 1880 the said contract was entered into with the City of Omaha, the outlying municipalities of East Omaha, South Omaha and Dundee were not in existence and were not within the contemplation of the parties to the contract, and that the election to purchase made by the City of Omaha under its option, was limited to the water works which the city had contracted for the construction of and which was used for the supplying of the City of Omaha with water for fire protection, public and domestic use and did not include outlying properties.

Your petitioner further avers that the City of Omaha did not, and does not have municipal authority to purchase the water works in the said outlying municipalities and is without power to appropriate money, to levy a tax, or to vote bonds to pay the purchase price therefor.

Your petitioner further avers that the facts stated in the foregoing paragraphs of this petition appear in the printed record in this case, and each and singular of the same were submitted to the Circuit Court and to the United States Circuit Court of Appeals for their consideration on the respective hearings.

Your petitioner believes that the judgment and de-

cree of the United States Circuit Court of Appeals for the Eighth Circuit is erroneous in the following particulars:

1. That the Court erred in holding that the terms of the contract reserving to the City of Omaha the election to purchase the water works authorized a valuation of the water works by a majority of the three appraisers, whereas the Court should have held that by the terms of the contract the valuation of the water works could only be ascertained by the concurrence of the three appraisers.

2. The Court erred in holding that the valuation of the water works, under the election clause in the contract, was in the nature of a public appraisement in which the appraisers were acting for the public as distinct from an appraisement under a contract between individuals or private corporations, whereas the Court should have held that the said contract between the City of Omaha and the Water Company as between the contracting parties, was governed by the same rules, principles and obligations that govern contracts between individuals or private corporations, as the same Court had previously held in the suit of the *Omaha Water Company v. The City of Omaha*, 147 Fed., 1.

3. That the Court erred in holding that the secret and *ex parte* receiving in evidence and examination of the books of the Omaha Water Company at Cincinnati, February 7, 1906, was not an improper procedure and was justified by precedent, whereas the said Court should have held that the same was misconduct on the part of the Omaha Water Company and on the part of the board of appraisers, and that said misconduct rendered the award void.

4. The Court erred in holding that the election to purchase by the City of Omaha included all the proper-

ties of the Omaha Water Works system, including the parts lying in the said outlying municipalities, and used only for the supplying of the said outlying municipalities with water, whereas the Court should have held that the said election to purchase, by its terms, was limited and confined to that part of the water works constructed under the contract with the City of Omaha, and used only for the purpose of supplying the City of Omaha with water for fire protection, public and domestic uses, and was so limited by Section 14 of the contract between the City of Omaha and the Water Company, said Section being the only authority under which the election to purchase existed.

5. That said Court erred in holding that the City of Omaha had corporate authority to purchase that part of the water works system extended into and used only for supplying the municipalities of East Omaha, South Omaha and Dundee with water, whereas the Court should have held that the City of Omaha was possessed of municipal authority to purchase only that part of the water works used for the supplying of the City of Omaha with water for fire protection, and public and domestic use, and such as was necessarily appurtenant thereto.

6. That the Court erred in reversing the decree of the Circuit Court and affirming the award and should have entered its order confirming the decree of the Circuit Court dismissing the bill of complaint.

7. That the Court erred in directing the Circuit Court to enter a decree finding that the award was in all things valid, and that the City of Omaha was required to accept the deed tendered by the Omaha Water Company and to pay for the said property the sum of \$6,263,-295.49.

Your petitioner believes that this Honorable Court

should require the United States Circuit Court of Appeals for the Eighth Circuit to certify the said cause to it for its review and determination in conformity with the act of Congress in such cases made and provided:

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record of proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit in the said case therein entitled "*Omaha Water Company, Appellant, v. The City of Omaha, Appellee*, No. 2683," to the end that the said case may be reviewed and determined by this Court, as provided in the Act of Congress entitled "An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the judgment of the said United States Circuit Court of Appeals for the Eighth Circuit in the said case and every part thereof may be reversed by this Honorable Court.

Your petitioner further represents that it has filed in the Clerk's office of this Court a certified copy of the transcript of the record including all proceedings in the United States Circuit Court of Appeals, Eighth Circuit, and has filed herewith its brief in support of this petition, its motion, and notice to the adverse party, as required by the rules of procedure.

JOHN LEE WEBSTER,
CARL C. WRIGHT,
HARRY E. BURNAM,
Attorneys for Petitioner.

STATE OF NEBRASKA, }
COUNTY OF DOUGLAS. } ss.

John Lee Webster, being duly sworn, says that he is one of the counsel for The City of Omaha, petitioner, that he knows the contents of the foregoing petition and that the allegations thereof are true as he verily believes.

John Lee Webster

Subscribed and sworn to before me by John Lee Webster, this the *5th* day of *May*, 1908.

My commission expires *Sept. 26, 1908*

May H. Feuley
Notary Public.

1871

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The Supreme Court of the United States
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Supreme Court of the United States

The City of Omaha

Plaintiff

vs.

No. 100

Omaha Water Company

Defendant

ORDER OF THE SUPREME COURT OF THE UNITED STATES
IN THE MATTER OF

Attorneys for the City of Omaha

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

VS.

OMAHA WATER COMPANY,

Respondent.

**BRIEF OF THE CITY OF OMAHA IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI.**

This action is a suit in equity brought by the Omaha Water Company v. The City of Omaha to compel the city to purchase the entire system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence for the sum of \$6,263,295.49 under a contract which the Circuit Court of Appeals has adjudged to be a public, as distinct from a private contract.

It is a matter of great public interest to the 175,000 people living in said cities and towns, and a matter which to many of them is of grave and serious concern for reasons to be stated.

It is a case which presents questions of law about which there is a serious conflict in the decisions between courts of different states, between the state and the federal courts, and between the different federal courts, as will be seen as we proceed. In one turning point in the case, the Circuit Court of Appeals between the same litigants, has handed down two opinions inconsistent with each other, one holding the contract between the city and the Water Company is a public contract, and the other holding the same contract is a private contract, and on these conflicting constructions rendered judgments against the city in each case.

A CONDENSED STATEMENT OF FACTS.

In 1880 the City of Omaha passed ordinances authorizing a contract for the construction of water works for supplying the City of Omaha with water for fire protection, and public and domestic use. The ordinance which became a part of the contract contained a clause as follows, (rec. pp. 784-790):

“Section 14.—The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, and these two to select the third, provided that nothing shall be paid for the unexpired franchise of said Company.”

Pursuant to said Section the Mayor and Council of the City of Omaha by an ordinance, approved March 2, 1903, elected to purchase the water works “as authorized and provided by Section 14 of Ordinance No. 423,” (rec. p. 179). The City of Omaha appointed an appraiser, the Water Company appointed an appraiser, and the two selected a third appraiser. The three appraisers met in the

City of Omaha July 20, 1903, (rec. p. 180), and began taking testimony in open session, (rec. pp. 149-150). The respective parties appeared by their attorneys, produced and examined witnesses and offered much evidence of a documentary character, (rec. p. 150). This manner of procedure the board continued from time to time until December 31, 1904, when the matters were argued orally and by printed briefs before the board of appraisers by the attorneys for the respective parties. At this date the board adjourned and took the valuation under advisement, (rec. pp. 151-152).

Subsequently in February, 1906, the Water Company secretly and without the knowledge of the City of Omaha, (then and there well knowing that the City of Omaha would protest against the secret and clandestine presentation of *ex parte* evidence), shipped its books of account, covering a period of ten years of its business, from Omaha to Cincinnati, Ohio, and there presented the same to the board of appraisers for their inspection and consideration, coupled with an understanding between the Water Company and the appraisers that the appraisers would secretly receive the said evidence and would refuse to disclose to the City of Omaha the nature, force or effect of the said evidence.

The city was never permitted to see the said books, although it demanded an opportunity to do so, and the city has never been advised of the contents thereof, nor to what extent the appraisers were influenced by the said books in fixing the value of the water works. It is manifest that the said books were the only source of information the appraisers had in finding the "going value" of the water works and may have had much weight in determining the cost of the construction of the works, as well as the purchase price of water pipes and pumping engines.

On the 7th day of July, 1906, the award was made fixing the value of the water works at \$6,263,295.49, which was signed by two of the appraisers, to-wit: Daniel W. Mead and G. H. Benzenberg, and which award was *not concurred* in by John W. Alvord, one of the appraisers, but who affixed to said report above his own signature, the words, "*I do not concur in above report, nor in the values as fixed therein.*"

The Omaha Water Company has extended its system of water works from the town of Florence on the north to the City of South Omaha on the south, and from East Omaha on the east to the town of Dundee on the west, and is engaged in supplying the City of Omaha and the other four named municipalities with water.

The appraisers included in their valuation the entire water works system. The City of Omaha contends that it is without corporate power to buy, or to levy a tax, or to issue bonds to pay for the outlying property. The Circuit Court held the award void and dismissed the Bill. The Circuit Court of Appeals held the award valid and directed the entry of a decree to that effect. The three primary legal questions for consideration, are:

(1) The award is void because not concurred in by the three appraisers.

(2.) The award is void on account of the misconduct of the appraisers and of the Water Company, arising out of the secret *ex parte* examination of the books of the Water Company by the appraisers in the City of Cincinnati more than a year after the public taking of testimony had been closed and case submitted.

(3) The award is void in that it includes property in outlying municipalities which the City of Omaha did not elect to buy, and which it is without corporate power to buy or to pay for.

BRIEF OF THE ARGUMENT.

I.

THE AWARD IS VOID BECAUSE NOT CONCURRED IN BY THE THREE APPRAISERS. THE ELECTION TO PURCHASE UNDER SECTION 14 OF ORDINANCE 423 CONTEMPLATED THE VALUATION TO BE ASCERTAINED BY THREE APPRAISERS, NOT BY TWO APPRAISERS.

The contract in the case at bar, by its language and by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that theory until the moment when it was finally determined that the three appraisers could not agree, whereupon for the first time, two appraisers assumed to make an award.

The law of the case is universal in both England and America that a contract worded as in the case at bar, requires the joint concurrence of all the appraisers and that an award by two is void.

The Court of Appeals disposed of this point in the case by holding that this appraisal was a matter of public concern as distinct from an appraisal under a contract, and cited in support of its conclusion the following cases: *Colombia v. Cauca Co.*, 190 U. S., 524; *Grindley v. Barker*, 1 Bos. & P., 229; *King v. Beetson*, 3 Term., 592; *Withnell v. Gartham*, 6 Term., 388; *Gas Co. v. Wheeling*, 8 W. Va., 320; *Green v. Miller*, 6 Johns, 39; *Ex Parte Rogers*, 7 Cow., 526; *Downing v. Rugar*, 21 Wend., 178; *Crocker v. Crane*, 21 Wend., 211; *People v. Nichols*, 52 N. Y., 478; *The People v. Walker*, 23 Barb., 304; *Young v. Buckingham*, 5 Ohio, 485; *Patterson v. Leavitt*, 4 Conn., 50; *Eames v. Eames*, 41 N. H., 177, 181.

No one of said cases meets the question in hand.

This court, in the Colombia case, puts stress upon the following points:

(a) That Colombia had taken over the railroad and had not offered to rescind, and was therefore not in a position to dispute the award.

(b) That the arbitration was between a sovereign state and a railroad company, declared by a law of Colombia to be a work of public utility.

(c) The Commission "had itself resolved, under the powers given to it in the agreement that a majority vote should govern" and had so acted during the whole course of its labors. The said case is, therefore, distinct from a case where the appraisers were appointed by the parties to a contract under a contractual agreement to deal with matters of business concern. The Colombia case falls within the exception to the general rule upon the proposition that it was one of international and public concern, in which not only the national government of the Republic of Colombia was interested, but in which the United States became interested and the Secretary of State appointed one of the appraisers.

The *Wheeling Gas* case is not in point for the reason that the act of the legislature of Virginia, which created the company, provided in the said act for the appointment of the appraisers in the event of the election to purchase. In that case it was not, therefore, a matter of contract between the city and the gas company, but was a matter arising only under a public law.

In any event, in the *Wheeling* case all that was said on the point was but an expression of the views of the writer of the opinion, but left the question open to future discussion, and was not the point on which the case was decided. This will be seen by what the writer of the opinion said in conclusion upon the subject; "But on account

of the seeming confusion of the authorities on the subject, and as I do not deem it material under the view I take of the award in other respects to finally determine it now, the right to reconsider and re-examine the question in a proper future case is reserved and left open."

Grindley v. Barker, 1 Bos. P., 229, was not a case of appraisers under a contract, but of "searchers" appointed under a public law to perform a public duty, to-wit: under an act of Parliament concerning tanners. They were public officers acting in the performance of a public duty and in no sense of the word were they appraisers or arbitrators.

King v. Beetson, 3 Term., 592, is a case of church wardens acting under an act of Parliament. In that case, Kenyon, chief justice, held that the statute under which they acted provided that a majority might act.

Withnell v. Gartham, 6 Term 388, is not a case of appraisal but of an appointment of a school master by the vicar and a majority of the church wardens.

Green v. Miller, 6 Johns., 39, is a case where the court held the award void because signed by four, the fifth not signing. The point ruled by the Circuit Court of Appeals is not in the case.

Ex Parte Rogers, 7 Cow., 526, is a case of damages assessed by canal commissioners, *appointed under an act of the legislature of 1825*. The commissioners are described by the court as a tribunal *appointed by law to act in a matter of public concern*. Confessedly they were acting as public officers in an official capacity. In that case the court said that in arbitration proceedings "the whole body must be unanimous."

Downing v. Bugar, 21 Wend., 178, the court stated the rule in the following language, p. 182:

"The rule seems to be well established, that in the

exercise of a public as well as private authority, whether it be ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number is such as to admit of a majority, that will bind the minority, after all have duly met and conferred."

The above quotation recognizes our point of contention, to-wit: that to justify an award by a majority the *authority must come from the public*. In all other cases, including those where the appraisers appointed by the parties under contract, even though acting in a public matter, all must join in the award.

Crocker v. Crane, 21 Wend., 211, is a case of commissioners appointed under an act of legislature incorporating a railroad company to receive subscriptions to the capital stock, not a case of appraisers appointed by the parties under a contract.

People v. Nichols, 52 N. Y., 478, is a case where three persons were named by an act of legislature of New York to appraise certain relics of George Washington. The Court held that a certificate by two was sufficient because they were public officers, acting under a public law, but in that case *Grover, J.*, delivered a dissenting opinion.

The People v. Walker, 23 Barb., 304, is a case of jury commissioners provided for under a statute of the state, not a case of appraisers appointed under contract, and in that case it was said that when a private authority is conferred on several all must be present and all must concur, unless provision be otherwise made.

Young v. Buckingham, 5 Ohio, 485, is a case of commissioners appointed by the court under a law of the state to condemn land for a public canal. It was held in that case that a majority of the commissioners might make an

award but because they were acting as public officers in a judicial capacity.

Patterson v. Leavitt, 4 Conn., 50, is a case where the court held the award *void* because agreed to by two, and where the third, as in the case at bar, entered his dissent in writing on the back of the submission.

Eames v. Eames, 41 N. H., 177, is a case where the court held the arbitration *void* because not concurred in by the three arbitrators.

It will be seen from this brief analysis of the cases cited by the Court of Appeals in its opinion, that the only cases wherein the courts ruled a majority might make the award, are cases where the appraisers were appointed and acting under a public law as *quasi* public officers, or appointed by governments in matters of international dispute. No one of the said cases applied the rule to arbitrators or valuers of property whose appointment is provided for under a contract and who are acting under such contract, as in the case at bar.

In the case at bar the appraisers were not appointed under ordinance 423. Said ordinance was an invitation for bids for the construction of water works to conform to the conditions and requirements of the ordinance. Bids were received and a formal written contract was entered into which by its terms made ordinance 423 a part of the contract. It was under this contract the water works were constructed and under this contract the option to purchase is reserved. Without this contract the water works would not have been constructed and no option to purchase exist. It is distinct in every sense of the word from the West Virginia and New York cases in that it arises under a contract.

Every argument stated by the Court of Appeals in its opinion to justify the award by two appraisers in the case at bar would apply with equal force to every ap-

praisement, or arbitration, or award made under a contract between individuals or corporations, yet the rule of law is universal in such cases that the award must be concurred in by all unless it is otherwise provided.

The statement by the court that it was not intended that the appraiser selected by the city or the one selected by the company might cause the appraisal to miscarry by refusal to join in the valuation found by the other two, is not justified by any language in the contract. On the other hand, we might suggest that the purpose and intention of the contract was that all three should concur in the award so as to insure a *fair* valuation and to prevent the Water Company securing an excessive and unreasonable valuation through the voice of a majority of the appraisers.

Language will be found in many of the authorities hereafter cited to the effect that the method in this case provided, to-wit: that each of the parties shall select one appraiser and these two the third, is to secure three things:

- (1) Unanimity in valuation.
- (2) A fair valuation.
- (3) That neither party shall obtain an undue advantage by the influence it may have or exercise over a mere majority.

The cases cited in the opinion of the Court of Appeals are exceptional cases to the general rule. The rule is, under provisions like that in the case at bar, that all three of the appraisers must concur in the award, otherwise it is void.

The contract was not that the city would purchase upon the valuation to be agreed on by a *majority*, nor by *two* of the appraisers. Neither is it a case where upon *disagreement* of the two that a third was to be selected, nor where a third was to be selected to act as *umpire*.

The conclusions from the terms of the contract of submission and cases supporting same are:

(a) The submission contemplated an appraisement and award by the three persons named.

(b) The fact that the third man was selected by the other two does not create an implication that two might make an award.

Willis v. Higginbotham, 61 Miss., 164.

Harris v. Denton, 39 So., 456.

Weaver v. Powel, et al., 23 Atl., 1070.

Lowe v. Brown, 22 Ohio St., 463.

Stose v. Heissler, 120 Ill., 433.

(c) The contract of submission contains no provision in direct terms or by implication for a majority award, therefore a majority award is void.

Memphis & Charleston R. Co. v. Pillow, 56 Tenn., 248.

Weaver v. Powel, et al., 23 Atl., 1070.

Lowe v. Brown, 22 Ohio St., 463.

(d) The rule of construction is that the contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all.

Richards v. Holt, et al., 61 Iowa, 529 (16 N. W., 595).

Hubbard v. Great Falls Manf. Co., 12 Atl., 878, (80 Me., 39).

Lowe v. Brown, 22 Ohio St., 463.

Godfrey v. Knodle, 44 Ill., App., 638.

Oakley v. Anderson, 93 N. C., 108.

Mackey v. Neill, 53 N. C., 214.

Anderson v. Farnham, 34 Me., 161.

Owens v. Withee, 3 Texas, 161.

(e) This is a common-law award, and the submission, Section 14 of Ordinance 423, does not contain a provision that two of the appraisers may make an award without the concurrence of the third.

The rule is general and *imperative* that all must concur in the award to render it valid, unless a contrary intention is *clearly* and *unmistakably* to be gathered from the terms of the submission.

Morse on Arbitration and Award, p. 162.

Willis v. Higginbotham, 61 Miss., 164.

Weaver v. Powel, et al., 23 Atl., 1070.

Eames v. Eames, 41 Conn., 177.

Towne v. Jaquith, 6 Mass., 46.

Nettleton v. Gridley, 21 Conn., 531.

(f) All must concur in the award to make it valid unless the *parties have agreed* that it may be made by less than all.

Leavitt vs. Windsor Etc., 54 Fed., 439.

Jeffersonville R. R. v. Mounts, 7 Ind., 669.

Willis v. Higginbotham, 61 Miss., 164.

Weaver v. Powel, et al., 23 Atl., 1070.

Green v. Miller, 6 Johns., 39.

Patterson v. Leavitt, 4 Conn., 50.

Towne v. Jaquith, 6 Mass., 46.

Byrd v. Harkrider, 108 Ind., 376.

Harryman v. Harryman, 43 Md., 140.

(g) Where the award is only signed by two and not concurred in by the third, unless there be an *agreement* by the parties that two may make the award the award will be void.

Morse on Arbitration, p. 162.

Jeffersonville R. R. Co. v. Mounts, 7 Ind., 669.

Willis v. Higginbotham, 61 Miss., 164.

Green v. Miller, 6 Johns., 39.

Patterson v. Leavitt, 4 Conn., 50.

Towne v. Jaquith, 6 Mass., 46.

Nettleton v. Gridley, 21 Conn., 531.

Byrd v. Harkrider, 108 Ind., 376.

Smith v. Waldon, 26 Ga., 249.

(h) The fact that each party selected an appraiser, and these two the third, does not give two the right to make an award, and an award so made is void.

Jeffersonville R. R. Co. v. Mounts, 7 Ind., 669.

Willis v. Higginbotham, 61 Miss., 164.

Patterson v. Leavitt, 4 Conn., 50.

United Kingdom, Etc. v. Houston, 1 Q. B. L.R., 567.

Conflicting decisions in the Circuit Court of Appeals.

The Circuit Court of Appeals in the case at bar, in order to justify its judgment, ruled in its opinion that the contract between the City of Omaha and the Omaha Water Company, under which the election to purchase was made and the proceedings relating thereto were had, was a matter of public concern as distinct from a business contract. It was on this theory that the Court escaped applying to the case at hand authorities which we have cited *supra*.

Omaha Water Co. v. The City of Omaha, 147 Fed., 1, is a case in which the same Court held that the same contract between the City of Omaha and the Water Company was a matter of private contract as distinct from one of public concern. That case arose under the same contract between the city and the Water Company. The City of Omaha undertook to reduce the meter rates provided for in the contract, claiming that the meter rates fixed in the contract were a privilege or immunity subject to subsequent modification, or failing that, that the said meter rates were a matter of public concern and of a public nature, and were subject to the control and modification of

the city as conditions changed, and did not constitute an irrevocable and unalterable contract. The Court of Appeals in that case held that the contract in question between the city and the Water Company was a business or proprietary contract under which the city was governed by the same rules as individuals or private corporations are governed.

The same Court now holds on the election to purchase, that the same contract between the City of Omaha and the Water Company is a public contract and of a public nature as distinct from a contract between individuals or a private corporation. Certainly the City of Omaha in dealing with the Water Company, has the right to have the contract receive the same interpretation in its different litigations with the Water Company. It cannot be that the same contract in one law suit shall be ruled to be a private contract for the purpose of nullifying the action of the city government in regulating meter rates, and in the next suit shall be held to be a public contract for the purpose of nullifying a subsequent action by the same city government.

Other cases in which the courts have held contracts of this sort to be private contracts, as distinct from public contracts, are: *Illinois Trust, Etc. v. City of Arkansas City*, 76 Fed., 271; *Wagner v. City of Rock Island*, 146 Ill., 139; *App. of Brum*, 12 Atl., 855; *Safety Insulated Wire & Cable Co. v. Mayor & City Council of Baltimore*, 66 Fed., 140; *Cincinnati v. Cameron*, 33 Ohio St., 336.

Wheeling Gas Co. v. Wheeling, 8 W. Va., 320, cited *supra*, if to be construed as holding that the arbitration is a public appraisal merely because the city is a party, is without precedent in judicial history and contrary to all authority on the point until the coming down of the opinion from the Court of Appeals in the case at bar.

A public appraisement, within the meaning of the law, is one where the appraisers or arbitrators are appointed under a state or national law and act as *quasi* public officers in the performance of a public duty.

Grindley v. Barker, 1 Bos. & Pull., 229.

King v. Beeston, 3 Term., 592.

Withnell v. Gartham, 6 Tenn., 388.

Ex Parte Rogers, 7 Cow., 525.

Sinclair v. Jackson, 8 Cow., 543.

Young v. Buckingham, 5 Ohio, 485.

State v. McMillan, 29 S. E., 540.

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 B. & C., 314.

To make an appraisement a public one, as distinct from a private one, the appraisers must be appointed under and act under the authority of a general law, as *quasi* public officers.

See cases cited *supra*.

Cooley v. O'Connor, 12 Wall., 391.

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 Barn. & Cress., 314.

The King v. Whitaker, 9 Barn. & Cress., 648.

People v. Walker, 23 Barb., 304.

People v. Coghill, 47 Cal., 361.

Hewitt v. Craig, 5 S. W., 280.

Where a matter is referred to arbitrators as *individuals*, there joint concurrence in the award is necessary, and the arbitration will be treated as a private, as distinct from a public proceeding.

Commonwealth ex rel. Hall v. Canal Commissioners, 9 Watts., 466.

People v. Walker, 23 Barb., 304.

The submission in the case at bar is a private con-

tract appraisement. The city in making its contract with the water company, was acting, not in its governmental capacity, but in its business capacity.

The City of Omaha v. Omaha Water Co., 147 Fed., 1.

Illinois Trust Etc. v. City of Arkansas City, 76 Fed., 271-282.

Wagner v. City of Rock Island, 146 Ill., 139-154.

Appeal of Brum, 12 Atl., 855.

Safety Ins. W. & C. Co. v. Mayor and City Council of Baltimore, 66 Fed., 140.

Cincinnati v. Cameron, 33 Ohio St., 336.

The city, by voluntarily entering into an arbitration agreement in a business of this sort, does so in its private capacity, as individuals and private corporations may do, and is bound by the same rules of procedure.

Kane v. Fond du Lac, 40 Wis., 495.

Dick v. Dummerston, 19 Vt., 362.

Hine v. Stephens, 33 Conn., 504.

Springfield v. Walker, 42 Ohio St., 543.

1 Dill. Mun. Corp., Sec. 478.

It follows that the award is void because not concurred in by all three appraisers.

It is a matter of common knowledge that water companies, and gas companies, and electric light companies, and street railway companies are "public service corporations," but the point remains that the contracts between such companies and the municipalities are to be treated as and are governed by the rules which control private contracts, and that the cities entering into contracts with these public service corporations are acting in their business or proprietary capacity.

No cases are cited in the opinion of the Circuit Court of Appeals to the point that a public service corporation

is exempt from the rules governing common law arbitration or that in such cases the majority may make an award unless it is so stipulated in the terms of submission, with the possible exception of the *Wheeling* case which we have already commented upon.

II.

THE AWARD IS VOID BECAUSE THE APPRAISERS CONCLUDED THE FORMAL HEARING OF TESTIMONY AND THE ARGUMENTS OF ATTORNEYS FOR THE RESPECTIVE PARTIES ON THE 31ST DAY OF DECEMBER, 1904, AND AFTERWARDS IN FEBRUARY, 1906. IN THE CITY OF CINCINNATI, PRIVATELY AND AGAINST THE PROTEST OF THE CITY OF OMAHA, RECEIVED AND SECRETLY EXAMINED EX PARTE, THE BOOKS OF THE WATER COMPANY, AND UNDER AN UNDERSTANDING THAT THE CITY OF OMAHA SHOULD NOT BE PERMITTED TO SEE OR KNOW THE CONTENTS OF SAID BOOKS.

The question to be considered involves a moral principle. The incident complained of did not give the city a "square deal."

The facts of this incident are as follows:

Between the date of the organizing of the Board, July 20, 1903, and the 31st day of December, 1904, some two thousand pages of typewritten evidence was formally introduced by the respective parties, and hundreds of plans and blue prints, and several hundred pages of inventory were presented, (rec. pp. 149, 150, 151 and p. 181). The attorneys for the respective parties made their formal arguments and filed printed briefs on the 31st day of December, 1904, (rec. p. 151), and the City of Omaha then understood that the taking of testimony was concluded and the matter taken under advisement.

Subsequently a meeting of the Board was called to

be held at Cincinnati, Ohio, February 7, 1906, although two of the appraisers, Mead and Alvord, lived in Chicago, and Benzenberg lived in Milwaukee. No notice of this meeting was given to the city, but notice was given to the Water Company by means of a letter written by the chairman of the Board to the manager of the Water Company, (rec. p. 176). During the time when the formal testimony was being taken in the City of Omaha, the Water Company had expressed a willingness that the appraisers might examine the books, conditioned that the city should not be permitted to be present or to see the books examined, (rec. p. 105).

Notwithstanding the protest of the city made at that time, the manager of the Water Company, in compliance with the letter of the chairman of the Board, shipped to Cincinnati the books of the Company for the years 1896 to 1905, comprising thirty large volumes, weighing several hundred pounds, (rec. pp. 106-107).

The attorney for the city, incidentally becoming advised that the books had been shipped to Cincinnati, sent to the Board a formal protest against the *ex parte* examination of the books, (rec. pp. 161-162). When the manager of the Water Company appeared before the Board of Appraisers in Cincinnati with his books, he was presented with this letter of protest from the attorney for the city, (rec. p. 108,) and in reply thereto the manager of the Water Company stated to the Board of Appraisers that he did not see why the Board should care whether the city or any one else, protested against the examination of the books, and he refused to give his consent to the city being present, for the reason that the information contained in the books was "confidential information," and further, that the books were presented for the purpose of assisting the Board in arriving at a valuation of the water works, (rec. p. 121).

The books were then examined by the Board of Appraisers with the understanding that the Board of Appraisers would keep secret the information derived from the books, and subsequently the books were shipped to Chicago and placed in the hands of an audit company to prepare therefrom a statement for the use of the Board of Appraisers, (rec. pp. 109-110), and that the treasurer of the Water Company went to Chicago and there remained several days to give such assistance as the audit company might desire, (rec. pp. 113-114).

The information of this startling misconduct on the part of the Water Company and of the Board of Appraisers, came through the examination of the manager and treasurer of the Water Company. No apology or explanation was ever given for it. It stands in the record as a bold and successful introduction ex parte of secret evidence intended to influence the appraisers in fixing the value, and the Board of Appraisers knowingly and wilfully were parties to this misconduct, because they did it after having read the letter of protest from the attorney for the city and after a consultation with the manager of the Water Company as to the propriety of doing it.

The Circuit Court of Appeals endeavors to dispose of this objection to the award by conceding that if the appraisers were acting as arbitrators that it would vitiate the award, but whereas they were acting as appraisers or valuers of property, there was no impropriety in this misconduct. That reasoning is begging the question. Whether a board of appraisers, valuers of property or arbitrators, the rule is the same, to-wit: that they have no right to enter into any arrangement or come to any understanding with one party in interest that he may furnish secret evidence for the purpose of influencing their

judgment or affecting the value of the property, coupled with the further understanding that this secret evidence shall be clandestinely presented and that the adverse party shall not be permitted to know what it is. In this case the Board of Appraisers practically agreed with the manager of the Water Company that they would not disclose to the city the fact that they had examined the books or the contents thereof, and would thereby not give the city any opportunity to know whether the books were correct or false or to offer any counter evidence.

No court would permit an appraisement of real estate under an execution to stand, where the appraisers were guilty of such misconduct.

The present case is more aggravated because this Board of Appraisers, from July 20, 1903, to December 31, 1904, one year and a half, had openly and publicly permitted the parties to present and examine witnesses in open session, thereby giving all parties in interest to understand up to that date, that the receiving and examination of evidence was to be open and above board in the presence of the parties after giving due notice. To resort to the secret method of receiving evidence more than a year later, to-wit: February 7, 1906, was such a departure from what had gone on before as to carry on the face of it the imprint of unfairness. To our minds it was such inexcusable misconduct as vitiates the award. So far as the writer of this brief is aware, no reported case can be found in any country where the English language is spoken that justifies such conduct or sustains an award under such circumstances, prior to the handing down of the present opinion.

(a) The conclusions warranted by the reported cases are that the *ex parte* examination by the Board of Appraisers of the books of the Water Company at Cin-

cinnati and against the protest of the City of Omaha, and without giving the City of Omaha an opportunity to examine said books or to be heard, was such misconduct as makes the award void.

Emery v. Owings, 7 Gill., 448.

Bassett v. Harkness, 9 N. H., 164.

Jenkins v. Liston, 13 Grat., 535.

Rand v. Peel, 74 Miss., 305.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Warren v. Tinsley, 53 Fed., 689.

Cameron v. Castleberry, 29 Ga., 495.

Walker v. Frobisher, 6 Ves., 69.

Strong vs. Strong, 9 Cush., 560.

Hewitt v. Village of Reed City, 124 Mich., 6.

Vessel Owners' Towing Co. v. Taylor, 126 Ill., 250.

Elmendorf v. Harris, 23 Wend., 638.

Dobson v. Groves, 6 Q. B., 637.

Western Female Seminary v. Blair, 1 Dis., 370.

In re Plews and Middleton, 6 Q. B., 845.

In re Tidswell, 33 Beav., 213.

Passmore v. Pettitt, 4 Dall., 270.

Wood v. Helme, 14 R. I., 325.

Jackson v. Roane, 90 Ga., 669.

Wilkins v. Van Winkle, 78 Ga., 557.

Rosenau v. Legg, 82 Ala., 568.

Knowlton v. Mickles, 29 Barb., 465.

Sisk v. Gary, 27 Md., 401.

Cleland v. Hedley, 5 R. I., 163.

(b) The receiving of *ex parte* evidence—the books of the water company—after the public taking of evidence had been closed and arguments of attorneys made, aggravates the misconduct and the award is void.

Walker v. Frobisher, 6 Ves., 69.

Jackson v. Roane, 90 Ga., 669.

Catlett v. Dougherty, 114 Ill., 568.
Wilkins v. Van Winkle, 78 Ga., 557.
Hewitt v. Village of Reed City, 124 Mich., 6.
Rosenau v. Legg, 82 Ala., 568.
Dobson v. Groves, 6 Q. B., 637.
Knowlton v. Mickles, 29 Barb., 465.
Western Female Seminary v. Blair, 1 Dis., 370.
Sisk v. Gary, 27 Md., 401.
Cleland v. Hedley, 5 R. I., 163.
Bassett v. Harkness, 9 N. H., 164.
Rand v. Peel, 74 Miss., 305.

(c) The *ex parte* examination by arbitrators of book accounts renders the award void.

Emery v. Owings, 7 Gill., 448.
In re Tidswell, 33 Beav., 213.

Same as to newspapers containing quotations of market prices:

Wilkins v. Van Winkle, 78 Ga., 557.
Jackson v. Roane, 90 Ga., 669.
Cleland v. Hedley, 5 R. I., 163.

(d) The *ex parte* examination by arbitrators of a written paper or statement renders an award void.

Jenkins v. Liston, 13 Grat., 535.
Natl. Bank of Republic v. Darragh, 30 Hun., 29.
Hewitt v. Village of Reed City, 124 Mich., 6.
Dobson v. Groves, 6 Q. B., 637.
Passamore v. Petit, 4 Dall., 270.
Wilkins v. Van Winkle, 78 Ga., 557.

(e) The *ex parte* examination of a witness, or the receiving of a statement from a witness *ex parte* renders the award void.

Walker vs. Frobisher, 6 Ves., 69.
Vessel Owners' Towing Co. vs. Taylor, 126 Ill., 250.
Elmendorf v. Harris, 23 Wend., 628.

Dobson v. Groves, 6 Q. B., 637.

Western Female Seminary v. Blair, 1 Dis., 370.

In re Plews and Middleton, 6 Q. B., 845.

Wood v. Helme, 14 R. I., 325.

Jackson v. Roane, 90 Ga., 669.

Rosenau v. Legg, 82 Ala., 568.

Knowlton v. Mickles, 29 Barb., 465.

Sisk v. Gary, 27 Md., 401.

Rand v. Peel, 74 Miss., 305.

(f) The law and public policy require that arbitrators shall give notice to the parties of each time and place when testimony is to be received, so that they may have an opportunity to be present and heard.

Lutz v. Linthicum, 8 Peters, 165.

Emery v. Oivings, 7 Gill., 448.

Warren v. Tinsley, 53 Fed., 689.

Vessel Owners' Towing Co. v. Taylor, 126 Ill., 270.

Elmendorf v. Harris, 23 Wend., 628.

Wood v. Helme, 14 R. I., 325.

Rosenau v. Legg, 82 Ala., 568.

Bassett v. Harkness, 9 N. H., 164.

McFarland v. Mathis, 10 Ark., 560.

(g) The fact that the *ex parte* evidence may be regarded as unimportant does not militate against the rule that declares the award to be void.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Dobson v. Groves, 6 Q. B., 637.

In re Plews and Middleton, 6 Q. B., 845.

In re Tidswell, 33 Beav., 213.

(h) An award made upon *ex parte* evidence or without giving notice of time and place of hearing, is void.

Marks v. No. Pac. R. Co., 76 Fed., 941.

Slater v. La Grand Light & Power Co., 73 Pac., 738.

Falconer v. Montgomery, 4 Dall., 432.

Wood v. Helme, 14 R. I., 325.

Day v. Hammond, 15 Am. Rep., 522.

Ingraham v. Whitmore, 75 Ill., 24.

Alexander v. Cunningham, 111 Ill., 511.

(i) The court will not permit an inquiry into the effect of the *ex parte* evidence, but will set aside the award.

Jenkins v. Liston, 13 Grat., 535.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Cleland v. Hedley, 5 R. I., 163.

Knowlton v. Mickles, 29 Barb., 465.

(j) It is not necessary for the City of Omaha to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence.

Warren v. Tinsley, 53 Fed., 689.

Elmendorf v. Harris, 23 Wend., 628.

Ingraham v. Whitmore, 75 Ill., 24.

Alexander v. Cunningham, 111 Ill., 511.

Jackson v. Roane, 90 Ga., 669.

(k) The award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

Walker v. Frobisher, 6 Ves., 69.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Dobson v. Groves, 6 Q. B., 637.

Passamore v. Petitt, 4 Dall., 270.

Knowlton v. Mickles, 29 Barb., 465.

McFarland v. Mathis, 10 Ark., 560.

(l) The water company will not be heard to say that its conduct in presenting its books to the board of appraisers did not improperly influence them or produce harmful results.

Catlett v. Dougherty, 114 Ill., 568.

Ins. Co. v. Hegewald, 66 N. E., 902.

(m) An arbitrator who takes instructions from one side—as Mead did from the manager of the water company regarding the books—is in law acting corruptly.

Strong v. Strong, 9 Cush., 560.

Western Female Seminary v. Blair, 1 Disney, 370.

(n) The city, having protested against the *ex parte* examination of the books, cannot be held to have waived the misconduct.

Dobson v. Groves, 6 Q. B., 637.

III.

THE CITY OF OMAHA IS WITHOUT CORPORATE AUTHORITY TO PURCHASE, OR TO LEVY TAXES, OR ISSUE BONDS TO PAY FOR THE WATER WORKS LYING WITHIN THE CORPORATE LIMITS OF SOUTH OMAHA, EAST OMAHA, DUNDEE AND FLORENCE USED FOR THE SUPPLYING OF SAID MUNICIPALITIES WITH WATER, EXCEPT THE INTAKE, PUMPING STATION AND SETTLING BASINS IN FLORENCE, WHICH ARE APPURTENANT TO AND AN ESSENTIAL PART OF THE SYSTEM FOR SUPPLYING THE CITY OF OMAHA WITH WATER.

The election to purchase was under that clause of the contract between the city of Omaha and the Water Company, known as Section 14 of Ordinance 423, passed in 1880. (p. 2, *supra*.) At the time when the said Ordinance 423 was approved and the contract for the construction of the water works entered into, these outlying municipalities, East Omaha, South Omaha and Dundee *were not in existence*, (rec. p.—), consequently it could not have been within the contemplation of the parties at that time that the water works were to be extended into these

municipalities, nor that the city of Omaha was to buy water works in these municipalities.

The report of the engineer designing the water works, (rec. 368-384), designed a system of water works for the city of Omaha alone. The Ordinance providing for the construction of the water works confined it to the city of Omaha, (rec. p. 784), and confessedly the franchise granted by the city of Omaha to the Water Company was only for the operation of a plant for the supplying of the city of Omaha with water for fire protection, and public and domestic use. The right of the city to purchase by election and appraisalment, under Section 14 of Ordinance 423, must be confined to the water works then contracted for and within the contemplation of the parties *if the said contract and the law then in force is to govern this case.*

The Court of Appeals endeavors to escape this position by the suggestion that subsequent acts of legislature, by implication, gave the city the power to purchase these outlying properties, to-wit: the Compulsory Purchase Act of the state of Nebraska of 1903, and the proviso in Act creating the Water Board, Section 7659 and Section 7661, Cobbey's Ann. Statutes of 1905, that the Water Board might "contract with any municipality adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes; or may contract, to the same end, with any person, co-partnership or corporation, supplying any such adjacent municipality with water for domestic, public or fire purposes, upon such terms and conditions as said Water Board may deem proper."

The above quotation from the Statute of 1903 said nothing about the *purchase* of water works property in said adjacent municipalities. There is a clear distinction between the power of the city of Omaha to buy water

works in adjacent municipalities and the power of the city of Omaha to enter into a contract to *deliver water* to a water works system in an adjacent municipality.

If the purchase of the water works is to be governed by the law as it existed when the contract of 1880 was entered into, then the court cannot resort to the Act of 1903 to enlarge the scope of the said contract. Upon the other hand, if the act of 1903 is to govern in any particular it must govern in all its provisions and particulars, and the said Act of 1903 referred to *supra*, gives the Water Board power "to regulate and fix the water rates—to make, modify and terminate on behalf of such city all contracts for the supply of water to such city for domestic, public or fire purposes," and the Circuit Court of Appeals held in *Omaha Water Company v. The City of Omaha*, 147 Fed., 1, that said Act did not apply to the contract between the city of Omaha and the Water Company. Furthermore, said Act of 1903 as amended in 1905 (Laws of Neb. 1905, p. 173), provided:

"Said Water Board shall have the sole power and authority—including—the acceptance or rejection of any award resulting from any such appraisal—provided, that no acceptance of any such appraisal shall be binding upon such city unless bonds are voted for the acquisition of such water plant under such appraisalment."

The Circuit Court of Appeals, in its opinion in this case, admits that the Water Board, under the Act quoted *supra*, rejected the award in controversy. It seems to us inconsistent for the court to say in one paragraph that the acts of the legislature subsequent to the making of the contract with the Water Company governed this case, wherein by *implication* it enlarges the power to purchase, or the scope of the purchase, or the terms of the contract relating to the election to purchase, and then in another

part of the same opinion to hold that the provision in the same law which gives the Water Board the power to reject the appraisalment or the award, does not apply to the case at bar. In other words, the court cannot invoke the Act of 1903, as amended in 1905, to sustain the appraisalment of the outlying properties, and then reject the same act of the legislature wherein it puts a limitation upon the appraisalment and award.

Beyond the question above stated there is another point overlooked by the Court of Appeals in its opinion, to-wit: that no act of the legislature is referred to and none is found in the statute books authorizing the city of Omaha to levy a tax to pay for the outside properties or to vote for and issue bonds to pay for outlying properties. The Court of Appeals in its opinion confesses that the language of the different acts of the legislature referred to is somewhat "unhappily chosen," and only by implication and surrounding circumstances does the Court conclude that the city has the power to purchase the outlying properties. The rule of law is to the contrary, to-wit: "That such power must be given in language *explicit* and *express* or *necessarily* to be implied from other powers," and "a fair and reasonable doubt of the existence of a corporate power is fatal to its being."

Citizens St. Ry. Co. v. Detroit Ry., 171 U. S., 48-53.
Electric Light & Power Co. v. Grand Rapids, etc. Co., 32 Fed., 659.

City of Ft. Scott v. Eads Brokerage Co., 117 Fed., 51.

State v. Irey, 42 Neb., 189.

Sexon v. Kelley, 3 Neb., 107.

The power of the city to purchase the water works system is limited to that part for which the city of Omaha

has power to levy taxes to purchase; (*Sutherland-Innes Co. v. Village of Ewart*, 86 Fed., 597), and is limited by the power of the city to that part for which the city of Omaha would have power to vote an issue of bonds to pay for.

Ottawa v. Carey, 108 U. S., 121.

No statute is appealed to by our adversaries giving the city of Omaha the authority to levy a tax or to vote bonds to pay for the water works properties in South Omaha, East Omaha and Dundee.

It has many times been held that the power of a municipality to construct, maintain or operate a system of water works is confined to the limits of said municipality and to the supplying of its own people with water, and that a municipality does not have power to extend a water works system to other cities or to supply other cities with water. That rule we believe to be uniform, unless there is an express statutory provision to the contrary.

Quincy v. City of Boston, 148 Mass., 389.

City of Lawrence v. Town of Methuen, 166 Mass., 209.

City of Pittsburg v. Bruce, et al., 158 Pa. St., 174.

City of Duluth v. Duluth Gas & Water Co., 45 Minn., 210.

Town of Bristol v. Bristol & Warren Water Works, 49 Atl., 974.

It is no answer to this argument to say, as the Court of Appeals said, that the municipalities of South Omaha and Dundee would have no other source of supply of water. There is no such proof in the record. South Omaha, under the laws of Nebraska, has the corporate power to construct its own system of water works, and to take water from any point on the Missouri River, even at the same place where the city of Omaha now takes its

water, if it elects to do so. The same ten mile limit referred to by the court in its opinion as indicating that the city of Omaha has power to purchase the works in South Omaha, gives the city of South Omaha the right to go to any point on the River within the same limit to obtain water. Again the city of South Omaha could obtain water within the same limit from the Platte River, which river extends east and west through the entire length of the state and from which the interior cities along its banks obtain their water. Furthermore, the city of Omaha and the city of South Omaha would have the power to contract as between their respective municipalities for the furnishing of water by the one city to the other, under the statute as it exists today. There is, therefore, no necessity at all for putting upon the statute by implication any forced construction for the purpose of enlarging the powers of the city of Omaha to the end that the present appraisalment should be sustained.

It is the settled law of this court that it has the right to take jurisdiction of a case of this sort by writ of *certiorari* at any stage of the proceedings in the United States Circuit Court of Appeals, either before or after a judgment or decree of said court, and independent of the question whether or not a final decree has been entered.

Forsyth v. Hammond, 166 U. S., 506.

We feel that this case is one possessing features which should appeal to the conscience of the court, and that its rules of procedure should be viewed in a spirit of liberality to the end that the City of Omaha and its people shall have the judgment of this court upon the questions involved.

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Attorneys for the City of Omaha.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 100

Office Supreme Court, U. S.

FILED

Mar 15 1908

THE CITY OF OMAHA

JAMES H. McKENNEY,
Petitioner.

vs.

THE OMAHA WATER COMPANY.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HOWARD MANSFIELD.

R. S. HALL.

Of Counsel for Respondent.

Supreme Court of the United States.

THE CITY OF OMAHA,
Petitioner,

vs.

THE OMAHA WATER COMPANY,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

FACTS.

This is an application by the City of Omaha to review a decision of the Circuit Court of Appeals for the Eighth Circuit, establishing an appraisal of water works, and directing the completion of their purchase, under an option exercised by the city.

By Act of the Legislature of Nebraska, approved February 27, 1879, the City of Omaha was given power to erect, construct and maintain water works, either within or without the city limits; also to contract with individuals or corporations to construct and maintain water works, upon such terms and under such regulations as might be agreed on (Record on Appeal, pages 2, 19, 764, Appendix, page 38).

Under this authority, the City of Omaha, by Ordinance No. 423, approved June 11, 1880, granted the right to any person, company, corporation or association who should erect, construct and maintain, in accordance with the report of an en-

gineer approved by the City Council, water works within and adjacent to the City of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof with water for domestic, mechanical and fire purposes, and should for twenty-five years agree to supply the city with water for fire protection and other public purposes on the lowest terms, the right of way under the public streets, alleys, public squares and public places of the city, for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such person, company, corporation or association, or their assigns, should maintain and operate any such water works and while constructing the same, upon the terms and conditions mentioned in the ordinance.

The ordinance contains the following relevant provisions:

“Section 11. In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident), all rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said city of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works, and property appurtenant there-

to, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in section 14 of this ordinance; Provided that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

"Section 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company and these two to select the third; Provided that nothing shall be paid for the unexpired franchise of said company."

(Record, pages 2, 20, 784, 791).

Under the offer thus made, a successful bid was made by one, Sidney E. Locke, to whom such contract for public supply was made under date of July 20, 1880 (Record, pages 2, 20, 354, 793).

The rights under this contract were subsequently assigned by Locke to the City Water Works Company of Omaha, by which corporation the works were constructed and completed to the satisfaction of the city, which accepted them September 4, 1883 (Record, pages 3, 21, 389).

The water works and all the rights of the City Water Works Company were subsequently assigned to the American Water Works Company of Illinois, which, on July 1, 1887, placed a mortgage upon the property, which was followed by a supplemental mortgage on January 16, 1889 (Record, pages 315, 340).

In 1880, the City of Omaha, contained about 30,000 inhabitants (Record, page 133). The site now occupied by the city of South Omaha was then farm land (Record, page 611).

The plant provided for by Ordinance No. 423 required the erection of a pumping station within the city limits, which became known as the Burt Street station, to be equipped with two engines with an aggregate capacity to pump 5,000,000 gallons each twenty-four hours, and the construction of a reservoir at Walnut Hill with a capacity of 10,000,000 gallons, and the construction of a distribution system equipped for public service with 250 hydrants (Record, pages 368 to 384).

Under provisions of the ordinance and contract requiring the development of the system to keep pace with the growth of the city, the principal pumping station was, between 1887 and 1889, erected at Florence on the Missouri River, some miles north of Omaha, where, in addition to a large pumping station, seven extensive settling basins were built and the river banks were strongly and permanently fortified against danger from action of the river. (Record, pages 608, 615, 626, 651 to 655, 656, 668, 694).

Florence, although at that time politically a city, was, and still is, a place of few inhabitants (Record, pages 504, 505). In connection with the establishment there of the pumping plant, certain streets were abandoned by the city for the use of the settling basins, and other concessions were made by the city by ordinances providing for the maintenance by the water company of a distribution system with hydrants for a permanent public

and private water supply (Record, pages 823 to 832).

In connection with the completion of the pumping plant at Florence, the supply main was extended to South Omaha, in which important industries were established by Omaha people as early as 1884, and which by 1886 had become an incorporated city, into which the streets of Omaha were virtually extended, with extension of street railroad tracks. In connection with this extension an additional pumping station was erected at Poppleton avenue, in the City of Omaha (Record, pages 8, 24, 134, 139, 442).

Subsequently, the water works system was extended to the lands of the East Omaha Land Company (Record, pages 6, 125, 505).

In 1889, the Village of Dundee, adjoining the City of Omaha on the west, granted to the water company the right to extend its mains and pipes through streets in that village (Record, pages 8, 26, 505).

The American Water Works Company became beset by financial difficulties, and in 1893 suit was brought for the foreclosure of its mortgages, and receivers of its property were appointed. The suit resulted, in 1896, in a foreclosure sale, at which the property was purchased by the trustee of the City Water Works Company and the rest were to be issued in part payment for the property and its subsequent enlargement and improvement (Record, pages 221, 222, 231).

For the purpose of the sale a preliminary appraisal of the cash value of the property was made by two freeholders of Douglas County, who valued the property as it then was at \$5,500,000 (Record, pages 398-402).

The Omaha Water Company authorized two mortgages to be placed on the property. One was a prior lien mortgage for not more than \$1,500,000, under which bonds to the amount of \$440,000 were to take up \$400,000 in amount of underlying bonds of the City Water Works Company and the rest were to be issued in part payment for the property and its subsequent enlargement and improvement (Record, pages 221, 222, 231).

The other was a consolidated mortgage for not more than \$6,000,000, under which bonds to the amount of \$3,600,000 were to be issued to complete payment for the property, and bonds to the amount of \$1,750,000 were to be reserved to take up the \$1,500,000 of prior lien bonds, the remaining bonds to the amount of \$650,000 to be used for the enlargement or improvement of the mortgaged property (Record, pages 243, 252).

Prior to the foreclosure sale the City of Omaha brought a suit in the United States Circuit Court for the District of Nebraska for the forfeiture of the water works system, under the provisions of Section 11 of Ordinance 423, various grounds of forfeiture being alleged. In this suit an amended bill of complaint was filed, after the property had been conveyed to the Omaha Water Company. In the bill of complaint the city alleged that all the property described in the mortgages of the American Water Works Company, then under foreclosure, including its property in Florence and South Omaha, was "absolutely essential to the operation of said water works", and claimed the power to acquire the same by proceedings in condemnation, or by proceedings under section 11 of the ordinance, and asked for a decree adjudging that

the city had a right to take immediate possession of all the tangible property of the water works plant of every kind and nature, including all the property described in the decree of foreclosure (Record, pages 763, 770, 779, 782, 340, 342, 346, 797-807, 391-397, 820).

The verified bill of complaint, although mistaken in supposing that it was proposed to remortgage the property for \$7,500,000, alleged that "*the value of said property is much greater than the sum for which the said bondholders' committee, as shown by said Exhibit F, propose to remortgage the same, namely, \$7,500,000*" (Record, page 778).

After trial a decree was entered dismissing the bill on the merits because no ground of forfeiture was proved (Record, page 29).

It was a question whether the period of twenty years, upon the expiration of which the City of Omaha would have the right to purchase the water works, ran from 1880, when Ordinance 423 was passed, or from September 4, 1883, when the works were accepted as completed. Therefore, under ordinance of January 23, 1900, the City Council authorized the submission to the electors, at a general election, the question and proposition of issuing bonds of the city in the sum of \$3,000,000 for the appropriation or purchase of water works or land therefor. The vote was taken with the result that the president of the City Council proclaimed, March 9, 1900, that the issuance of all of said bonds had been duly authorized by the required vote of the legal electors of the City of Omaha (Record, pages 194-205).

Meanwhile, and by revision of the City Charter in 1897, the mayor and council had been given

power "to erect, construct, purchase, maintain and operate * * * water works * * * either within or without the corporate limits of the city * * *, including the appropriation of private property for the public use in the construction and operation of the same" (Sec. 135), as well as power to condemn water works property, including any existing system of water works, within the city limits and within ten miles from the city (Sec. 27). Appendix, pages 39, 40, 43.

No further steps towards a purchase having been taken, the legislature of Nebraska passed an act, approved February 2, 1903, requiring the city council of any city of the metropolitan class, Omaha only being intended, that had previously voted bonds for water works, to declare that it was necessary and expedient for the city to construct or purchase a system of water works, and in case of election to purchase, that such city should acquire such water works plant either by appropriation or through the exercise of any right enuring under contract. The act also provided for a water board to exercise jurisdiction over water works, not only within the City of Omaha but within ten miles from the city limits (Record, pages 15, 29, 179). Appendix, pages 45, 46, 49, 50.

Under the Act of 1903, the Governor of Nebraska appointed a water board, the members of which organized and took upon themselves the performance of the duties mentioned in the act (Record, pages 16, 29).

On March 2, 1903, an ordinance was passed by the mayor and council of the City of Omaha, entitled "An Ordinance declaring that it is necessary and expedient for the City of Omaha to purchase the system of water works operated by the

Omaha Water Company, and providing for notification by the water board and to said water company to select one engineer as an appraiser to ascertain the value of said water works plant."

The mayor and council expressly declared "that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, * * * and do elect and determine to purchase and acquire such water works plant by virtue of the rights enuring to said city through the contract between said city and the grantors of said water company and as authorized and provided by Section 14 of the Ordinance No. 423" (Record, page 179).

Thereupon, the mayor and council selected, as one of the appraisers, for the purpose of ascertaining the valuation of said water works plant, John W. Alvord, of Chicago, an engineer of high standing and a specialist as a sanitary engineer (Record, pages 49, 51, 64, 65); and the Omaha Water Company selected, as the second appraiser for such purpose, George H. Benzenberg, of Milwaukee, holding a prominent position also in Cincinnati, an engineer in the front ranks of municipal engineers, and now president of the American Society of Civil Engineers (Record, pages 47, 50, 59, 67, 74, 76, 77); and the said Alvord and Benzenberg selected, as the third appraiser, for such purpose, Daniel W. Mead, of Madison, an eminent specialist in regard to water works, and professor of Engineering in the University of Wisconsin (Record, pages 60, 66, 69, 73, 76, 17, 29, 180).

The appraisers met at Omaha on July 20, 1903, and organized as a board by the election of Mead, as chairman, and Alvord, as secretary, and thereupon received such testimony, as was submitted

by the company and the city for the purpose of fixing the value of the water works. The course of the appraisers in general was for the water company to prepare and submit its schedules and estimates to the representatives of the city, by whom the various items of property were checked over, and upon objection to any items by the city authorities, sworn testimony in support thereof was given by the company (Record, pages 159, 167, 510, 512, 513).

At the outset, Mr. C. C. Wright, the city attorney, submitted to the board of appraisers, on behalf of the City of Omaha, a suggested outline of the plan of procedure to be followed in the appraisal of the Omaha water works. Paragraph Fourth of this outline is as follows:

"4. As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the Water Company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the Water Company, the City of Omaha suggests that this Board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the City of Omaha that it would

be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, whose judgment the question of value must be submitted upon the examination of the property."

(Record, pages 161, 162.)

At the close of a series of public hearings, at which both the city and the water company were represented by counsel, and a large amount of testimony was taken and reduced to writing, the chairman of the board made the following announcement:

"In closing this session of the board, which by common consent of the parties to this appraisal, is to be regarded as the last on which formal evidence is to be presented, and after receiving and listening to the able arguments of counsel, the matter of this appraisal has been formally handed to this board, the board wish to call the attention of the parties to this appraisal to the fact that, while much work had been already done, that the work of valuation of this board as a board has only just commenced. We have before us some thousand or more plats, diagrams, schedules, descriptive matter, some two thousand pages of evidence, and the arguments of counsel.

It becomes the duty of this board now to examine in detail these various schedules, to weigh the evidence presented, to examine the arguments which have been forwarded from this mass of matter, to arrange a schedule on which a valuation can be made by the board. It is undoubtedly evident to all who have followed closely these proceedings, that this will involve a considerable labor; that

undoubtedly much more information must be sought by the board than that already presented; and that the board will undoubtedly wish to call on the city and the company for special information as to details, the necessity for which will develop as the work proceeds.

In this connection I wish specially to call your attention to the fact that this is not a work of days or of weeks, but of months. While the board will undoubtedly take this matter up as expeditiously as possible, it must be recognized that the members of this board have other demands upon their time besides that of this appraisal, and I speak these words simply to make clear the fact that we recognize that no immediate report can be made, and that no such immediate report must be expected in this connection.

If there are no further matters to come before the board the board will stand adjourned. I will say in this connection that the members of the board will probably remain in Omaha over Saturday in order to collect the various exhibits and to prepare for further work."

This was near the beginning of the year 1905 (Record, pages 153 to 155, 166, 167).

On July 7, 1905, the water board and the City of Omaha filed in the Circuit Court of the United States for the District of Nebraska, a bill in equity against the three members of the board of appraisers and the Omaha Water Company, in which it was alleged that the board of appraisers were without power or authority to determine any matters of law, or to subpoena witnesses, or compel the production of books and papers in evidence, and that under the law there was no provision for any review of their award, either

by appeal or error to any of the Courts of the State of Nebraska or of the United States; and that serious differences had arisen in and before the board, involving questions of law and the construction of the contract under which the appraisalment was being made, involving the question of the powers and duties of the board under the contract; and that the members of the board were divided in their opinion upon the construction of the contract and upon the question as to what items of property should properly be included in their estimate of the value of the water works, which questions it was alleged the board was without authority to determine or adjudicate.

It was further alleged that the City of Omaha was without the power in law to purchase or operate water works outside of the city, or for the purpose of supplying any other city or its inhabitants, and that the appraisers were at variance with regard to whether or not such outside property should be included, but, unless restrained by the order of the Court, would make and return one entire award for all of the property of the Omaha Water Company, including the property outside of the city, without segregation of the separate amounts estimated.

The bill further alleged that the water company was contending that the estimate of the value of the property be appraised as of the date of the passage of Ordinance No. 5162, namely, March 2, 1903, but that if fixed at such date the estimate of value would be \$200,000 more than if found and returned as of the date of the award, or of the submission to the appraisers, to wit, January 3, 1905, but that the water board and the

city contended that the award should be made, and that the estimate of value should be fixed, either as of the date of the award, or as of said date of submission.

The bill of complaint further objected to the inclusion of various property as not necessary to the water works and claimed that, unless restrained by order of the Court, the board of appraisers would improperly return, as part of their estimate of value, a large sum on account of river protection at Florence, and include in their estimate improperly a large sum for the going value of the water works system. Thereupon prayer was made that it be decreed that the City of Omaha had no right, power or authority in law to purchase, own or operate any part of the water works system belonging to the Omaha Water Company lying outside of the City of Omaha, and that it was the duty of the appraisers to estimate the value of the water works to be purchased, as of the date when the award should be rendered, or as of the date of January 3, 1905, and not otherwise, and that they should exclude from their return consideration of the value of any pipe system or connections with the water plant situate in adjacent municipalities, and should exclude certain lands acquired for the erection of an additional reservoir and other lands, and should allow nothing for what is termed "going value", or for the increased value of the mains in the City of Omaha made necessary for the supplying of adjacent municipalities with water, and should exclude the value of the Poppleton Avenue pumping station, and the cost of extending land into the Missouri River, adjacent to the reservoirs at Florence.

Upon this bill a restraining order was granted, enjoining the appraisers, until final hearing and disposition of a motion for temporary injunction, from including in their estimate or award any amount for the properties or items objected to in the bill of complaint. (Record, pages 452, 453.)

Upon the bill and answer and return to the motion for a temporary injunction a decision was made, in accordance with which an order was entered November 29, 1905, directing the appraisers not only to make one appraisement which should include the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the City of Omaha and vicinity, but separate appraisements of its property in the adjacent municipalities, with separate findings of going value, and that the appraisers should "make and return the aforesaid values, as far as practicable under the evidence and to the best of their judgment as of the date of the award." (Record, pages 576 to 582). Thereupon, the appraisers resumed work upon the appraisement.

At a public meeting of the board of appraisers, at which counsel for the city, as well as the company, were present, counsel for the company had openly announced that all the books, vouchers and other papers of the water company were open for examination by the appraisers for their exclusive and confidential information, for the sole purpose of the appraisal. (Record, p. 757.)

Thereupon, the three appraisers went to the company's office and made a preliminary inspection of the company's books, announcing that they intended to examine them more fully later. (Record, page 123.)

On January 3, 1906, the chairman of the board of appraisers wrote to the company that the appraisers would meet in Cincinnati in February, and asked the company to send its books to that city at that time. (Record, page 176.)

On learning of this request, the city wrote a letter objecting to any examination of the books at Cincinnati by the appraisers alone. (Record, pages 191 to 193.)

The books, consisting of journals, ledgers, cash books and voucher registers of the company from 1896 to 1905, being at least thirty volumes, were sent to the appraisers at Cincinnati, and subsequently were sent to Chicago for examination by an audit company selected by the board of appraisers.

No question has been raised as to the accuracy of the books, and there is nothing in the evidence to show what use, if any, was made of their contents by the appraisers. There is no evidence or claim or suggestion that any use was made of the books to the prejudice of the city. (Record, pages 104 to 123, 149, 176, 562 to 567, 757 to 763.)

The board of appraisers made its report under date of July 7, 1906, returning their valuation as nearly as possible as of that date. The report was signed by the appraisers Mead and Benzenberg, and to the report was appended: "I do not concur in the above report, nor in the values as fixed therein. John W. Alvord." (Record, pages 178 to 186.)

It appears that all of the appraisers were present at all meetings of the board, including the meeting at which the report was signed, and took part in the examination of witnesses and in the

investigations of the property. (Record, pages 180, 181, 159 to 167.)

The board of appraisers found the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the city of Omaha and vicinity, embracing all work and material included in the plant to January 1, 1906, to be \$6,263,295.49 (Record, pages 184, 186).

At the time the appraisal was made, the system of water works operated by the Omaha Water Company embraced, besides the original pumping station and settling basins on the Missouri River at Burt Street, a re-enforcing pumping station at Walnut Hill, and a supplementary pumping station at Poppleton Avenue, within the City of Omaha, the main pumping station at Florence, with its seven settling basins, and equipped with low service and high service pumps each of a capacity to pump from the river into the basins, and from the final basins into the supply mains, as much as 20,000,000 gallons a day, and a distribution system of about 230 miles of pipe, supplying a total population of about 175,000, and with provision for fire protection through 1884 hydrants (Record, pages 8, 139, 504 to 525).

Upon ascertaining the amount of the appraisal, the water board, at a meeting held July 9, 1906, adopted resolutions reciting various claims of illegality with respect to the appraisal, and declared the report to be rejected (Record, pages 186 to 191).

On July 9, 1906, the president of the water company demanded of the mayor of the City of Omaha and the president of the water board payment of

the amount of the appraisement, and tendered a deed of the appraised property, and, upon the refusal of the mayor and of the water board to complete the purchase, filed its bill of complaint for a specific performance of the contract of purchase (Record, pages 1, 17, 40 to 43, 834).

The city filed an answer to this bill, setting up as defenses substantially the objections recited in the resolutions rejecting the appraisement. Replication was made by the company (Record, pages 19, 40).

Thereupon, testimony was taken, in the course of which the proceedings on the appraisement were put in evidence, and the various facts already recited were proved. It was proved, among other things, that at an early hearing before the board of appraisers, the chairman of the water board stated that the city, he believed, wanted to buy the entire works, and he believed that to be the opinion of nine-tenths of the city; that they wanted to purchase the entire property if they possibly could do it, and that they expected to do it (Record, page 755).

The chairman of the water board also testified that from time to time, while the appraisal was going on, he had frequent conversations with Mr. Alvord, the appraiser selected by the city, in which discussions were had with regard to values, including the value of the riprapping and the price of pipe, and the date for valuation and other matters relating to the appraisement (Record, pages 555, 559).

Upon the final hearing, a memorandum of opinion was handed down to the effect that the examination of the company's books by the appraisers,

without permitting the same to be examined by the counsel for the city "was such an irregularity as vitiates the award"; and without expressing any views of the Court upon the other questions raised and argued, except giving value, the Court directed a decree to be entered, dismissing the action (Record, pages 208, 209).

Thereupon, a decree was entered accordingly, dismissing the bill with costs (Record, page 210). Assigning errors, the water company took an appeal to the Circuit Court of Appeals for the Eighth Circuit (Record, pages 210 to 214).

The appeal was heard at the December term, 1907, before Hook and Adams, Circuit Judges, and Carland, District Judge.

The opinion of the Court, delivered by Hook, Circuit Judge, and concurred in by the other judges, was filed April 7, 1908, directing a reversal of the decree below, and remanding the cause with direction to proceed to decree, in accordance with the views expressed in the opinion. The validity of the purchase of the entire system of water works operated by the Omaha Water Company, and the validity of the appraisement were established by this decision.

Counsel for the City of Omaha has served on counsel for the respondent copies of a petition to the Supreme Court of the United States for a writ of certiorari for the review of the decision of the Circuit Court of Appeals, and copies of a brief in support of the petition, with notice of submission of the petition and brief on May 18, 1908, assigning as reasons for reversal:

First.—That the appraisal is void because not concurred in by the three appraisers.

Second.—That the appraisal is void because the books of the water company were examined by the appraisers under an understanding that the City or Omaha would not be permitted to see or know the contents of the books.

Third.—That the appraisal is void in that it includes extensions of the water works in the outlying municipalities adjacent to the City, for the sole purpose of supplying those municipalities with water.

POINT I.

The present case does not fall within any class of cases in which this Court has been known to review the judgment of a Circuit Court of Appeals by Writ of Certiorari.

In view of the statements made by the Chief Justice when the petition for a writ of certiorari in *The City of Omaha et al. v. The Omaha Water Company* was before the Court, and of the denial of the writ in that case, it is assumed that the rule repeatedly asserted by this Court will be strictly adhered to.

The City of Omaha et al. v. The Omaha Water Company, 207 U. S., 584, 585;

Forsyth v. Hammond, 166 U. S., 506;

Fields v. U. S., 205 U. S., 292.

The language of the Court in the case last cited applies in all respects to the case in which a writ of certiorari is now sought.

"In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this Court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of State and Federal Courts, or between those of Federal Courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public" (p. 296).

(a) However important the present case may be to the City of Omaha, the questions involved are not questions of gravity and general importance. It is not enough that, as stated in the petition for the writ, they are "of great public interest and importance to the 175,000 people" living in that city and the adjacent municipalities. It is essential that the matter be one of general interest to the public of the nation.

It is obvious that the question as to the power of the City of Omaha to purchase and pay for so much of the system of water works it has elected to buy as lies within the bounds of adjacent municipalities, is necessarily a question of local statutory construction. It follows that this Court cannot, in this case, lay down any rule of construction that will be of general application. Every case of municipal authority to construct or purchase and operate water works must depend upon the constitution and statutes of the

State within which the municipality is located, and, where determined by the highest Court of that State, is not subject to review by this Court.

As remarked in *Missouri, Kansas, &c. Railway v. McCann*, 174 U. S., 580, 586,

“The elementary rule is that this Court accepts the interpretation of the Statute of a State, affixed to it by the Court of last resort thereof.”

And as was said in *Claiborne County v. Brooks*, 111 U. S., 400, 410,

“It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State.”

In illustration of the proposition that no rule of general application can be laid down by this Court through a review of the decision of the Circuit Court of Appeals in the present case, reference may be made to the decision in *Peabody v. Westerly Water Works*, 20 R. I., 176.

In that case, where a taxpayer of Westerly, R. I., brought suit to enjoin the purchase by that town of the plant of the water works company, located partly in that town and partly in the neighboring towns of Stonington and North Stonington, in the State of Connecticut, the Supreme Court of Rhode Island dismissed the bill, holding the purchase to be valid. It was not doubted by the Court in that case that the Town

of Westerly, under a Statute of Rhode Island, authorizing the water works company to sell, and the town to buy, all the property and rights and franchises of the company, whether situate, held, enjoyed or exercised by it within or without the State of Rhode Island, might lawfully both purchase and operate an existing system of water works, extending not only into adjacent municipalities, but into an adjacent State, without the necessity, and in the entire absence, of any concurrent action on the part of those adjacent municipalities, or the State in which they were located.

Should this Court entertain the present motion, and, on a review of the case, decide that the City of Omaha had not statutory power to complete in all respects the purchase it has undertaken to make, could that decision control the Supreme Court of Rhode Island, if a case similar to the Westerly case were to come before it? Would not the earlier decision of that Court be naturally and properly followed, uninfluenced by the decision of this Court, except as the reasoning of this Court might appear persuasive?

If, moreover, the present purchase of the system of the Omaha Water Company were to fail in consequence of such a ruling by this Court, on such a review, and a purchase of equal scope were again attempted by the City of Omaha and the same question of power were to arise in the Courts of Nebraska, in a suit by the city to compel the company to convey its entire system, wherever located, on an appraisement satisfactory to the city, would the Supreme Court of Nebraska be under any obligation to follow the decision of this Court on the subject?

If the city, in such a suit, were to claim that under Section 14 of the Ordinance of 1880, it was entitled to acquire "all the tangible property of the water works plant of every kind and nature," wherever located, which in 1896 it claimed it could acquire by forfeiture under Section 11 of the ordinance, and the Supreme Court of Nebraska were to sustain that claim, in spite of the inconsistency of the previous positions taken by the city, could this Court, upon any theory, review that determination?

Can this Court, through a review of the decision in the present case, lay down, even for the Circuit Courts of Appeal of the country, any general rule for the government or guidance of those courts on such questions of municipal authority as may hereafter arise under the statutes of the different states within their several circuits?

Must it not, therefore, be held that the principal question raised in the petition for a writ of certiorari in this case, does not fall within the category of questions of such gravity and general importance as to require review by this Court through this exceptional procedure?

(b) As there is, in point of fact, no conflict between federal and state courts, or between different federal courts of appeal, on any question involved in the present case, so there is, in fact, no conflict in the decisions of the Circuit Court of Appeals for the Eighth Circuit with respect to any such question.

In holding in *Omaha Water Company v. City of Omaha*, 147 Fed., 1, following well established precedents, that "in contracting for the construc-

tion or purchase of water works to supply itself and its inhabitants with water, a City is not exercising its governmental or legislative, but is using its business or proprietary, powers" and that "the purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the City and for its denizens" (p. 5), the Court held nothing inconsistent with the proposition that the purchase by the City of Omaha of the Omaha water works is a matter of public concern.

It is submitted that the ruling of the Court in the rates case was not, as claimed by counsel for the city in the petition for certiorari, that the contract for water supply "was a matter of private contract as distinct from one of public concern."

It is also submitted that the same Court has not, as claimed in the petition, held with regard to the election to purchase, "that the same contract between the City of Omaha and the Water Company is a public contract and of a public nature, as distinct from a contract between individuals or a private corporation."

All that was held in this regard in the rates case was that the contract under consideration was made by the city in the exercise of its business or proprietary powers, in distinction from its governmental or legislative powers.

What has been held in the specific performance suit is that the purchase of the water works under the contract is not a matter of a governmental or legislative character, but is nevertheless, from the nature of the case, a matter of public concern.

The essential distinction drawn by the Court in the specific performance suit, with respect to the power of a majority of the appraisers to make a valid appraisal, is the distinction between the submission of a question of price under a contract, or a matter in controversy, between private individuals, to three appraisers or arbitrators for appraisal or determination, and the submission of similar questions to appraisers or arbitrators in matters affecting the interests of a considerable number of persons. For, in a merely private matter, failure of the appraisal or arbitration would leave the parties where they were before, still free to contract with regard to the subject matter, or to have their differences determined by the Courts; whereas, in similar matters affecting a considerable number of persons, not parties to the contract or controversy, but members of the general public, failure of the appraisal or arbitration would leave them without power to consummate a purchase by agreement or to enforce the purchase or secure the determination of the controversy by resort to the Courts.

Hence, it has been uniformly held that, in a matter of public concern, considerations of public policy require that the decision of a majority shall control, so that the purpose of an appraisal or arbitration shall not be defeated or delayed in a case where any considerable number of the public are interested, but are without means of directly protecting their interests, or enforcing a contract which may enure to their benefit.

But it has never been held that the matter in question must be a matter of governmental or leg-

islative character, or a matter of public, as distinct from private, contract, or a matter which must concern a community as a body politic, or must concern the entire community. It is enough in every such case that the matter in question be merely a "matter of public concern," or, as said in the leading case of *Grindley v. Barker*, 1 Bos. & Pul., 229, be "in some respects of a general nature."

There is, therefore, no inconsistency whatever between the holding of the Circuit Court of Appeals in the rates case and its ruling in the specific performance suit.

In fact, the only inconsistency observable is in the position taken by the counsel for the city, who are applying for a writ of certiorari upon the ground that the questions involved in the case "are of great public interest and importance to the 175,000 people living in said cities and towns, and questions which to many of said citizens are of grave and serious concern" (Petition, page 1), to enable the counsel to argue that the purchase involved is not a matter of public concern, but of an entirely private nature, and requiring, therefore, the concurrence of all three appraisers.

The question of the validity of the appraisalment, in spite of the mere non-concurrence of the third appraiser, is neither a novel question, nor one on which there is a real diversity of opinion.

The statement in the petition, that the contract in Ordinance 423, providing for an appraisal for the purpose of a purchase, "by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that

theory until the moment that the three appraisers could not agree", is an entirely groundless assertion, if sought to be supported by evidence in the case. So far as there is any evidence of what was the understanding of the parties, it is to the effect that the city counsel of 1880, the legislature of 1903, the city counsel of 1903, and the water board must have contemplated that the exercise by the city of the option to purchase would surely result in an appraisal and municipal ownership, and that none of these bodies could ever have thought that such a result could be defeated by the refusal of one of the appraisers to concur in the appraisal. The purpose of Ordinance 423 must have been that the city would, beyond peradventure, "become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith," as certainly through an appraisal for determination of the price upon a purchase under Section 14, as through an appraisal for determination of the compensation upon a forfeiture under Section 11. (Record, pages 789, 790.) Is it conceivable that, in case a forfeiture had been decreed in 1897, and two of the three appraisers had agreed upon compensation unsatisfactory to the company, or a low appraisal had been made by Messrs. Mead and Alvord, without the concurrence of Mr. Benzenberg, in 1906, counsel for the city would have accepted the theory that consequently the forfeiture or the purchase must fail?

The statement in the petition that "the law of the case is universal in both England and America, that a contract worded as in the case at bar, requires the joint concurrence of all the apprais-

ers and that an award by two is void", can only be true of a contract which is a matter entirely of private or individual concern. Where the matter is one of public concern, the rule has always been that a decision of a majority of the appraisers is valid.

Grindley v. Barker, 1 Bos. & Pul., 229;
King v. Beetson, 3 Term., 592;
Withnell v. Gartham, 6 Term., 388;
Green v. Miller, 6 Johns., 39;
Ex parte Rogers, 7 Cowen, 526;
Sinclair v. Jackson, 8 Cow., 543;
Patterson v. Leavitt, 4 Conn., 50;
Young v. Buckingham, 5 Ohio, 485;
Eames v. Eames, 41 N. H., 177;
Phippen v. Stickney, 3 Metc., 384;
People ex rel. Washington v. Nichols, 52 N. Y., 478;
Gas Co. v. Wheeling, 8 W. Va., 320;
Colombia v. Cauca Co., 190 U. S., 524.

That the acquisition of a system of public water works by a municipality is necessarily a matter of public concern is also uniformly held by the Courts.

As said in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S., 685, "that the supply of water to a city is a public purpose cannot be doubted" (p. 689).

To the same effect are:

Minneapolis Mill Co. v. Board of Water Commrs. of St. Paul, 56 Minn., 485;

Winters v. City of Duluth, 82 Minn., 127;

Slingerland v. Newark, 54 N. J. L., 62;

Kennebec Water District v. Waterville, 96 Me., 234;

Munn v. Illinois, 94 U. S., 113;

Budd v. N. Y., 143 U. S., 517.

(c) There is no novel question involved in the methods or procedure of the appraisers in this case, nor is there anything in the circumstances of the case to make it either necessary or desirable that this Court lay down a new rule for the general guidance of appraisers.

There can be no doubt that it is the general rule in cases of arbitration, resting on a long line of decisions, that the parties to the controversy must have notice of hearings before the arbitrators, and that the witnesses must be examined under oath, unless the taking of an oath be waived, and must be examined in the presence of the parties, who have the right of cross examination; although, even in cases of arbitration, the strict rules governing the trials and decisions of Courts are not always applied.

People ex rel. Bliss v. Board of Supervisors, 15 N. Y. Supp., 748;

Hall v. Norwalk Fire Insurance Co., 57 Conn., 105.

It is equally true that there is a clear and vital distinction between an arbitration and an appraisal, and that this distinction runs through the proceedings from beginning to end; that it con-

cerns the origin and nature of the proceeding, the official character of the persons who are chosen to determine the matter submitted, the rules governing their procedure and method of determination, and the quality and effect of their decision.

This distinction is firmly established by the decisions of a number of Courts of high authority—wherever, indeed, the question appears to have been raised.

It is stated in *Fry on Specific Performance*, 2nd Edition, as follows:

“SEC. 341: The persons nominated to value are sometimes, though inaccurately, spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute; valuers to ascertain the value of the subject-matter of the sale.”

In support of this distinction, the following cases may be cited:

Eads v. Williams, 4 De Gex, Mac-Naghten & Gorden, 674;
Green & Coates Streets Pass. Ry. Co. v. Moore, 64 Pa., 79;
Kelly v. Crawford, 5 Wall. (S. C.), 785;
Palmer v. Clark, 106 Mass., 373;
James v. Schroeder, 61 Mich., 28;
Noble v. Grandin, 125 Mich., 383;
Guild v. Railroad Co., 57 Kansas, 70;
Wurster v. Armfield, 175 N. Y., 256;
Norwich Gas & Electric Co. v. The City of Norwich, 76 Conn., 565.

This distinction, and the consequently broad discretion allowed appraisers, are so well estab-

lished and so widely recognized that they were unhesitatingly announced to the Board of Appraisers at an early meeting, by the city attorney, representing the City of Omaha in the appraisal proceeding.

At that meeting, as appears from the record in the present case, Mr. Wright submitted to the appraisers a written outline of the plan of conducting the appraisal, which the city desired to have adopted. In that plan, he made the following statement, with reference to the nature of the proceeding:

“As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the City of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, to whose judgment the question of value must

be submitted upon the examination of the property" (Record, p. 162).

Although it appears from the pleadings and so much of the proceedings in the appraisement suit as have been made a part of the record in this case, that nearly every conceivable question which could be suggested with reference to the procedure and conduct of the appraisers was raised, no doubt was expressed as regards their discretion in their methods of procedure and manner of obtaining information for the purposes of the appraisement. Only through the exigencies of litigation have counsel for the city felt compelled to change their attitude and question the methods of the appraisers, in which all of the appraisers joined and from which no prejudice whatever to the city is shown or claimed to have resulted.

There is, therefore, no doubtful question of general law or proper procedure arising in this case by reason of any conduct of the appraisers, nor is there any general principle, based upon the special circumstances of this case, which properly calls for statement or elucidation by this Court.

(d) The amount of money involved in this special case affords no ground for exceptional review through a writ of certiorari.

Except for vague charges that the appraisement is excessive, there is no basis whatever for any suggestion that there has been an overvaluation of the water works in question. In no particular is it charged that the appraisers have been biased or have reached a conclusion contrary to the facts. All that is definitely averred against the report in this regard is that outlying

properties have been improperly included and that certain pieces of real estate within the city limits are not essential to the system, and that no allowance should have been made for what is known as "going value." It is not even hinted that the city was prejudiced to any pecuniary extent by such examination as the appraisers made of the company's books. So far as that examination has been made a ground of objection to the appraisal, it has been urged by way of bare technicality. The charge is unsupported by evidence and baseless in fact, and is also a wanton insult to engineers of the highest rank in their profession that, in the language of the petition for the writ of certiorari, "the incident complained of did not give the city a square deal."

While refusing to concur in the report and valuation of the other appraisers, the third appraiser does not impeach in any respect the appraisal in which he had shared from the beginning to the end, nor criticise the estimate of any item of property.

On its face, there is nothing inordinate in a valuation of \$6,263,000 of a system of water works embracing four pumping stations, equipped with pumps capable of pumping and distributing more than 20,000,000 gallons of water daily; seven settling basins; a reservoir with a capacity of ten million gallons; a distribution system more than 230 miles in length, connecting with more than 1800 hydrants; a system supplying approximately 175,000 people with water for domestic and mechanical uses and fire protection and other public purposes. When it is considered that this system, more than ten years

ago, was valued by sworn appraisers for the purpose of sale at auction at \$5,500,000, and was then declared in a verified pleading of the City of Omaha to be worth more than \$7,500,000, and is mortgaged for nearly the amount of its present value, as found by the appraisers, it is idle to talk about an excessive valuation.

The act of 1903 was passed by the legislature of Nebraska, and the option to purchase was, in the same year, exercised by the mayor and city council of Omaha, with necessarily full knowledge of these notorious facts. The mayor and council then deliberately chose to acquire this system of water works by virtue of the right of purchase reserved by contract, involving the determination of the price by the appraisement of three engineers, instead of by appropriation under the powers granted by the city charter (Act of 1903, Sec. 3).

Because the City Council of Omaha, in 1900, saw fit to submit to the electors the question of issuing bonds to the amount of only \$3,000,000, for the purpose of acquiring the water works, is no reason for regarding double that sum as an excessive valuation. It was scarcely to be expected that the city would suggest more than a minimum price. Even the Act of 1903 recognized the improbability of any such low valuation, and expressly provided that if at any stage of the proceeding for acquisition of the water works, it should appear that the amount of bonds previously voted would be insufficient, the electors should have the opportunity to vote for the issue of enough additional bonds to complete the purchase (Act of 1903, Sec. 4, Appendix, page 46).

Therefore, in absence of any novel questions of law or need or possibility of declaring in this case

any general rule of statutory construction, there is no reason why this Court, or any Court, should undertake to review an appraisalment made by experienced engineers chosen in accordance with the terms specified by the City of Omaha in the original ordinance, and made for the purpose of a purchase resolved upon by the city in the exercise of an option which the water company was powerless to prevent.

POINT II.

The present application should not be allowed to serve the purpose of a stay of the proceedings which, by the opinion of the Court of Appeals, the Circuit Court is directed to take.

Under the circumstances the motive of delay seems more obvious than any hope on the part of counsel for the applicant that the writ of certiorari will be granted. It can scarcely be doubted that the pendency of the application will be urged, with fair prospect of success, as a reason for postponement of further proceedings. Thus the water company will continue to be unable, as it has been for the last five years, to derive full benefit of the ownership of its property, because of inability to extend and develop the works while under appraisalment, and provision for payment and possession and operation by the city will be indefinitely postponed—with a vista of fur-

ther litigation, but with real advantage to neither the water company nor the city.

POINT III.

The petition for a writ of certiorari in this case should be denied.

HOWARD MANSFIELD,
R. S. HALL,
Of Counsel for Respondent.

Appendix.

The following portions of Statutes of the State of Nebraska cited in the foregoing brief are printed for reference, under the rule:

Act of 1879.

“An Act Entitled ‘An Act to amend Section Fifteen (15) of an Act entitled “An Act to incorporate cities of the First Class,”’ approved March 28, 1873 (General Laws of 1879, p. 95).

“Be it enacted by the Legislature of the State of Nebraska:

“That Section Fifteen (15) Chapter Eight (8) of the general statutes of Nebraska, entitled ‘An act to incorporate cities of the first class,’ approved March 28, 1873, be amended so as to read as follows:

“Section 15. The mayor and council of each city created or governed by this act shall have the care, management and control of the city and its property and finances, and shall have power to pass any and all ordinances not repugnant to the constitution and laws of this State, and such ordinances to alter, modify or repeal, and shall have power: * * *

“27. To erect, construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such water-works, and to do all acts necessary for the construction, completion, management and control of the same * * * and the mayor and council of each city created or

governed by said act shall have power to contract with and to procure individuals or incorporations to construct and maintain water-works on such terms and under such regulations as may be agreed on" (p. 99).

CHARTER OF OMAHA PRIOR TO LEGISLATION OF 1903.

"Sec. 27. The mayor and council shall have power to provide for keeping the sidewalks clean and free from obstructions and accumulations and may provide for the assessment and collections of taxes on real estate, and for the sale and conveyance thereof to pay the expenses of keeping the sidewalk adjacent to such real estate clean and free from obstructions and accumulations, as herein provided. To provide for the planting and protection of shade or ornamental and useful trees, and for the protection of birds, their nests and eggs. To provide for, regulate and require the numbering or renumbering of houses along public streets or avenues; to care for and control, to name and rename streets, avenues, parks and squares within the city, to provide for the opening, vacating, widening and narrowing of streets, avenues and alleys within the city, under such restrictions and regulations as may be provided by law. *Provided*, That no street or avenue shall be narrowed to a width of less than sixty-six feet, except on petition of two-thirds of the owners of the lots and real estate along that portion of the street or avenue narrowed. To appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, electric light plants or water works, including mains, pipe

lines, and settling basins therefor, the right and power to appropriate private property for sewers, parks, parkways, boulevards, electric light plants and water works, to extend for a distance of ten miles from the corporate limits of the city; they shall also have power to appropriate any water works system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises to own and operate the same, if any. All cities of the metropolitan class, upon condemning private property under such authority, shall cause to be recorded an accurate plat and a clear, definite description of the property so taken in the office of the register of deeds of the county within which such city is located, within sixty days after the other legal steps for the acquisition of such title shall have been taken."

"Sec. 101b. In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, park ways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and council a system of public parks,

parkways and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or ground so designated, the power to appropriate lands, lots or ground for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated or purchased as hereinafter provided, assess such real estate as may be specially benefitted by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessment. And the mayor and council are further authorized upon the recommendation of said park commissioners and with their concurrence to purchase in the name of said city, lands, lots or grounds within the limits herein designated to be used and improved for parks, parkways or boulevards, notwithstanding said limits include lands, lots or grounds within the corporate boundaries of other cities or villages, and if such lands, lots or grounds are in the limits of other cities or villages, said cities or villages shall cease to have jurisdiction over the said lands, lots or grounds after the said lands, lots or grounds are acquired for parks, parkways or boulevards as aforesaid by gift, purchase, condemnation or otherwise; and for the purpose of paying for and improving lands, lots or grounds purchased or appropriated for parks, parkways or boulevards the mayor and council may issue

bonds for such purpose to an amount necessary, not to exceed fifty thousand (\$50,000) dollars per year, said bonds to be designated and known as "Park Bonds, Series.....," and to be issued and used in accordance with the provisions governing the issuance of sewer, funding, and other public improvements bonds by this act contemplated. *Provided*, no such bonds shall be issued until the question of the issuing of the same has been submitted to the electors of the city at a general or special election therein, and authorized by a vote of two-thirds ($2/3$) of the electors voting on said question at such election. When improvements are made upon or in streets, or sidewalks adjacent to, and abutting upon, parks, parkways or boulevards and similar grounds in the charge control of said board of park commissioners, the cost or expense of which would otherwise be chargeable to the city, the same shall be paid from the park fund tax herein provided; and said commissioners are hereby directed to pay the cost of such improvements. Said board of park commissioners shall be composed of five members, who shall be resident freeholders of such city, and who shall be appointed by the judges of the district court of the judicial district in which such city shall be situated. 'The members of said board shall be appointed by said judges, a majority of said judges concurring, but the members of said board heretofore appointed and now acting shall hold their office for the full time for which they were appointed under the law heretofore enforced, and vacancies occurring from expiration of their term shall be filled by further appointments by said judges for the term of five years; it shall be the duty of said judges, a majority concurring, to

appoint or reappoint, one of said board each year on the second Tuesday of May, and to fill for the unexpired term any vacancies existing in the board. A majority of all the members of the board of park commissioners shall constitute a quorum. It shall be the duty of said board of park commissioners to lay out, improve and beautify all lands, lots or grounds now owned, or hereafter acquired for parks, parkways or boulevards. They may employ a secretary and such landscape gardeners, superintendents, engineers, keepers, assistants or laborers, that may be necessary for the proper care and maintenance of such park, parkways or boulevards, or the improvements or beautifying thereof, to the extent that funds may be provided for such purpose. The members of said board at its first meeting each year after the first Tuesday in May shall elect one of their own members as chairman of said board. Before entering upon their duties each member of said board shall take an oath to be filed with the city clerk, that he will faithfully perform the duties of his appointment and in the selection or designation of lands, lots or grounds for parks, parkway or boulevards, and in making appointments he will act for the best interests of such city and the public, and will not in any manner be actuated or influenced by personal or political motives. The members of said board shall receive no compensation and serve without cost to the city."

"Sec. 135.—The mayor and council shall have power to erect, construct, purchase, maintain and operate subways and conduits, water works, gas works and electric light plants, either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental

or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction, and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen."

LAWS OF NEBRASKA, 1903, CHAPTER 12.

A BILL FOR

An Act to provide in cities of the metropolitan class, viz.:

1. For the procedure in certain cases, by the mayor and council in the acquisition of a municipal water plant:
2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees.

3. Penalties for interference with water plant, or employees of water board in the discharge of their duties:

4. For a Water Fund, its revenues, and the disbursement and application thereof:

And amending Sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled "An Act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An Act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,' "approved March 30, 1887, and all acts amendatory thereof, being Chapter 12a of the Seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895), entitled 'Cities of the Metropolitan Class,' approved March 15, 1897, being Chapter 12a of the Tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled "The Compiled Statutes of the State of Nebraska, 1881, (Tenth edition), with amendments 1882 to 1901, comprising all the laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, and repealing said original sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEBRASKA:

SECTION 1. (BONDS FOR CONSTRUCTION OR PURCHASE OF WATER PLANT.) In any city of the metropolitan class which has heretofore voted or

may hereafter vote bonds for the construction or purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall within thirty (30) days after the election at which such bonds are or have been voted, or in case such bonds have been heretofore voted, then within thirty (30) days after this act shall take effect, declare by ordinance that it is necessary and expedient for such city to construct or purchase, as the case may be, a system of water works.

SEC. 3. (METHOD OF PURCHASING.) In case bonds are or have been heretofore voted for the purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall, beginning at the first meeting of the council after the approval of said ordinance, proceed to take the necessary steps to acquire such water plant under the powers granted by the charter of such city, or by virtue of any rights inuring to such city through contract or otherwise; and if at any stage of the proceedings instituted to acquire such water plant, the mayor and council shall, unduly or unreasonably delay, then and in such case, said mayor and council may be compelled to act by mandamus at suit of the water board of such city; and, further, if at any stage of the proceedings it shall be ascertained that the bonds hereafter or heretofore voted for the construction or purchase of said water plant are inadequate in amount, then, it shall be the duty of the mayor and council, and mandatory thereon, to submit to the voters of such city, in the manner prescribed by law, a proposition for the issuance of bonds in such further amount as may be necessary for the construction or purchase of such water plant, as the case may be.

SEC. 4. (APPRAISEMENT). If the method of procedure adopted by the mayor and council for the acquisition of such water plant shall involve the appointment of one or more appraisers by the council, or by the mayor and council, then, and in such case, it shall be the duty of the mayor and council to at once notify the water board stating the number of appraisers to be appointed. Upon receipt of such notification the water board shall propose for appointment, by the council, or by the mayor and council, as the case may be, at the time of the next regular meeting of said council, the names of as many appraisers as may be indicated in said notification. And it shall be the duty of the council, or the mayor and council, as the case may be, to appoint or reject, at the time of such meeting, the appraiser or appraisers so proposed by said board. In case of rejection of all or any one of the appraisers proposed, as herein provided, it shall be the duty of the water board, at the time of every regular meeting of the council thereafter, to propose another or other appraisers for appointment, and so to continue until the full number of appraisers shall have been appointed by the council, or by the mayor and council, as the case may be. No such appraiser or appraisers shall be appointed by the council, or by the mayor and council, unless such appraiser or appraisers shall have been first proposed by said water board; neither shall any appraisement of said water plant be submitted to the people of such city for ratification or rejection unless the same shall have been, also, first approved by said board. If the method of procedure adopted by the mayor and council for the acquisition of such water plant

shall involve, by reason of contract, the appointment of any appraiser or appraisers by the corporation, partnership, or individual or individuals owning such water plant, and the said corporation, partnership, individual or individuals shall, for thirty (30) days after such appointment of an appraiser or appraisers should, under the contract, have been made, fail to appoint such appraiser or appraisers, then in such case, the water board, representing the rights of the city in the premises, shall have authority, and it shall be their duty, to bring appropriate proceedings in the district court of the county in which such city is located to compel the said owner or owners of such water plant to appoint such appraiser or appraisers, or upon their failure then so to do, to have such appraiser or appraisers appointed in their behalf by the court or judge before whom such action is brought. Such action both in the district court and in the supreme court, if such action shall be taken to the supreme court, on appeal or writ of error, shall take precedence for trial over all other cases on the dockets of such courts and be advanced for hearing as soon as at issue.

Sec. 5. (ELECTION OF WATER BOARD).—In each city of the metropolitan class owning and operating a municipal water plant, or which has heretofore voted or may hereafter vote bonds for the construction or purchase of a municipal water plant, there shall be a water board consisting of six (6), two of whom shall be elected at the time of each general state election held in the even numbered years, one from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election.

Members of said board shall hold office for a period of six (6) years from the first Tuesday after the first Monday of January following their election, and until their successors shall be elected and qualified; provided, however, that the members of the first board shall be appointed in such manner and for such terms as hereinafter set forth.

Sec. 6. (APPOINTMENT OF FIRST WATER BOARD).—The Governor shall appoint the members of the first water board, all of whom shall be electors of such city, two to serve from the date of their appointment for four years, and two from the date of their appointment for two years, from the first Tuesday after the first Monday of January following the general election held in the even numbered years, next after their appointment; and two to serve until said first Tuesday after the first Monday following the general election, held in the even numbered years, next after their appointment. One member for each term herein designated, shall be appointed from each of the two political parties casting the greatest number of votes for Governor at the last preceding election. Such appointments shall be made within thirty (30) days after the election at which bonds shall have been voted for the construction or purchase of a municipal water plant, or if such bonds have been heretofore voted, or if such city has heretofore acquired a municipal water plant, then within thirty (30) days after this act shall take effect.

SEC. 10. (POWERS OF BOARD).—The water board shall have general charge, supervision, and

control of the design, construction, operation, maintenance and extension or improvement of any water plant owned and operated by such city, including the power to purchase and contract for necessary material, labor and supplies, and this power shall not be subject to the approval or action of the mayor and city council; but no new construction or extension of such water plant shall be undertaken, involving the expenditure of more than five hundred dollars (\$500) without the approval of the mayor and council, neither shall any extension or improvement of such water plant be undertaken without the approval of said board; provided, that nothing herein contained shall be construed as prohibiting said board from preparing or providing engineering plans and specifications, for any such proposed construction, extension or improvement, or for the purpose of making any estimates which said board may deem necessary, without such approval. The authority and powers herein conferred upon the water board shall extend as far beyond the corporate limits of said city as said board may deem necessary, not to exceed ten (10) miles.

SEC. 12. (WATER RATES AND SERVICE FEES).—It shall be the duty of the water board and the water board shall be charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service, or the sale of water; provided, that all payments on account of water service, or the sale of water, and all other receipts of the board from whatever source, shall be received and receipted for by the city treasurer, or by an employee of the city treasurer's office, who shall be assigned by said treasurer for such purpose. The

water board shall have authority to make such rules and regulations for the conduct of the water plant, and the use and measurement of water supplied therefrom as it may deem proper, and shall also have authority to cut off any water service for non-payment or non-compliance, on the part of the water user, with the rules and regulations adopted by the board for the conduct of its business and affairs.

SEC. 14. (INTERFERING WITH PLANT OR EMPLOYEE).—Any person who shall wilfully interfere with or obstruct an employee of the water board in the discharge of his duties, or who shall wilfully tamper with or injure such water plant, or the pipes connected therewith, shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be punished by a fine of not over one hundred dollars (\$100.00), or imprisonment in the county jail not over sixty (60) days, or both such fine and imprisonment in the discretion of the court.

SEC. 18. (WATER FUND, LEVY, ETC.).—The water fund shall consist of all moneys received on account of the water plant for water service or otherwise, together with a water tax to be levied—in lieu of the “fund for paying water rented for fire purposes and for public use”—by the mayor and council, at the same time, and as in the case of other funds provided for city purposes under the provisions of the charter of such city, the amount of said tax to be certified to the mayor and city council by the water board on or before the second Tuesday in January in each year, and not to exceed the sum of one hundred thousand dollars (\$100,000), and it shall be mandatory upon

the mayor and council to levy the same as above provided. Such fund, together with any interest received thereon, shall be used only for the purpose of paying interest on any water bonds issued by the city, the cost of operation, maintenance and extension or improvement of the water plant, and the salaries and expenses of the water board, its employees and assistants as herein provided. The balance remaining in the water fund at the end of each year shall be placed in a sinking fund, provided for the payment of any outstanding water bonds of such city, or for extraordinary improvements of the water plant.

SEC. 19 (SECTIONS AMENDED).—That sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled "An act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,' approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled 'Cities of the Metropolitan Class,' approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled "The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendment 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, compiler of

date July 1, 1901, be and the same are hereby amended to read as follows:

SEC. 135 (DUTIES OF COUNCIL).—The mayor and council shall have power to erect, construct, purchase, maintain and operate subways or conduits, water works, gas works and electric light plants either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction, and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen. (Water Board of Paramount.) Provided, that nothing in this section contained shall be so construed as to interfere with the powers, duties, authority and privileges, conferred and imposed upon the water board as prescribed by law, but in all matters relating to the purchase, construction, maintenance and manage-

ment of a water works plant for such city or in any way appertaining thereto, the said powers, duties, authority and privileges of such water board so far as elsewhere conferred, imposed and defined by law shall be exclusive and paramount.

SEC. 20 (REPEALING CLAUSE).—That said sections 16, 24, 25, 29, 32, 33, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of said act entitled "An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government," and to repeal an act entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled "Cities of the Metropolitan Class," approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901) entitled "The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, Compiler of date July 1, 1901, as heretofore existing be and the same are hereby repealed.

SEC. 22 (EMERGENCY CLAUSE).—Whereas an emergency exists this act shall be of full force and effect from and after its passage and approval.

Approved February 2, 1903.

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Office Supreme Court, U. S.
ST. LOUIS

FEB 10 1910

JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

THE CITY OF OMAHA,

VS.

No. 189.

THE OMAHA WATER COMPANY.

OCTOBER TERM 1909

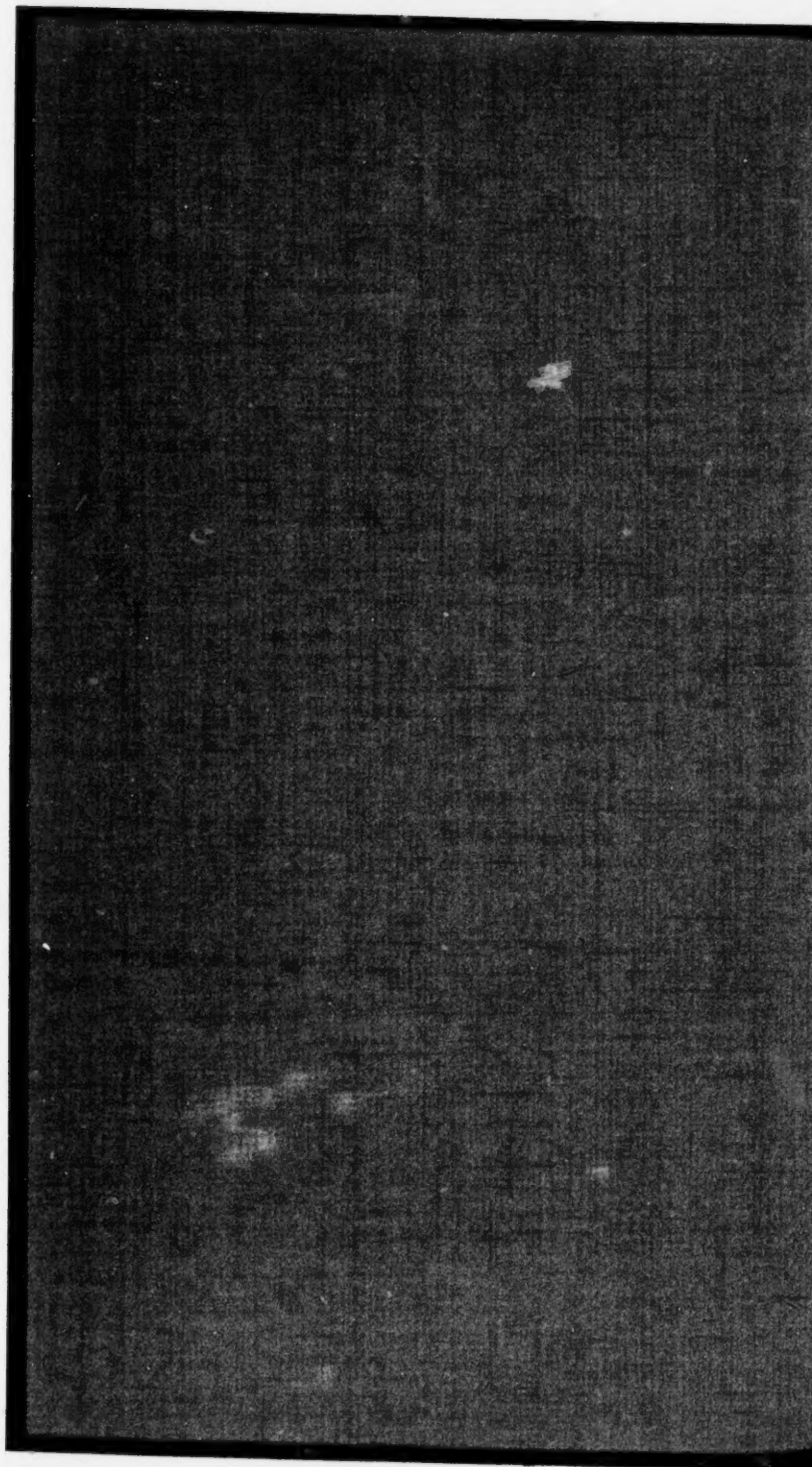
BRIEF FOR CITY OF OMAHA.

JOHN LEE WEBSTER.

CARL C. WRIGHT.

HARRY E. BURNHAM.

Solicitors for City of Omaha.



Supreme Court of the United States.

THE CITY OF OMAHA,

VS.

THE OMAHA WATER COMPANY.

} No. 159.

OCTOBER TERM 1909.

BRIEF FOR CITY OF OMAHA.

STATEMENT OF THE CASE.

This case is a suit in equity by Omaha Water Company vs. The City of Omaha to require the city to accept a deed of conveyance of the entire system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence, and pay to the Company therefor the sum of \$6,263,295.49; said sum of money being the amount of an appraisement the city insists is invalid and void.

The principal reasons why the city insists that the said appraisement is invalid and void are:

First. That the contract under which the appraisement was made required that the same should be concurred in by the three appraisers, whereas, the valuation made was concurred in by two of the appraisers and dissented from by the third appraiser.

Second. That there was misconduct on the part of the board in this: The board of appraisers held open sessions from July 20, 1903, to December 31, 1904, receiving and hearing as a judicial body, evidence tendered by the respective parties; and more than one year after the taking of evidence had been closed and the case argued by the attorneys and submitted, the said appraisers secretly and against the protest of the City of Omaha, received *ex parte* evidence tendered by Omaha Water Company and which the city was not given an opportunity to examine or to rebut.

Third. That said appraisers, without authority under the contract or warrant in law, included in the award a large sum of money for "going value."

Fourth. That said appraisers, without authority, and without warrant in law, included in said award the value of those parts of the water plant lying outside the City of Omaha and being within the limits of South Omaha, East Omaha, Dundee and Florence, and used for the supplying of the said last named municipalities with water and not necessary or incidental to the supplying of water to the City of Omaha.

In 1880 the City of Omaha passed ordinances authorizing a contract for the construction of water works for supplying the City of Omaha with water for fire protection and public and domestic use. (rec. pp. 680-686.) Ordinance No. 423, which became a part of the contract, contained the following, (rec. p. 686):

"Sec. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; Provided that

nothing shall be paid for the unexpired franchise of said company."

Pursuant to said section the City of Omaha, by an ordinance approved March 2, 1903, (rec. pp. 159-160) elected to purchase the water works "as authorized and provided by section 14" of ordinance No. 423, quoted *supra*. The city of Omaha appointed John W. Alvord an appraiser, the Water Company appointed G. H. Benzenberg an appraiser and the two selected Daniel W. Mead the third appraiser. The three appraisers met in the city of Omaha July 20, 1903, and organized as a board by electing Daniel W. Mead chairman and John W. Alvord secretary (rec. p. 161) and began taking testimony in open session. (rec. p. 133.) The city of Omaha appeared by its attorney, Mr. Carl C. Wright, and the Water Company appeared by its attorneys, Mr. James M. Woolworth, Mr. Howard Mansfield and Mr. R. S. Hall. Said attorneys produced and orally examined under oath a large number of witnesses. The typewritten report of the evidence so taken covered about 2,000 pages (rec. p. 161) and filled five volumes. (rec. p. 142.)

In addition to the above the parties submitted many hundreds of plans and blue prints and several hundred pages of inventory. (rec. p. 161.) This manner of taking evidence was continued by the board from time to time until December 31, 1904, (about a year and one-half), when the matters were argued orally and by printed briefs before the board of appraisers by the attorneys for the respective parties. At this date the board adjourned and took the valuation under advisement. (rec. pp. 133, 161, 491.)

Subsequently, in Feb., 1906, (a year and two months after the submission), the Water Company secretly and without the knowledge of the city of Omaha (then and

there well knowing that the city of Omaha would protest against the clandestine presentation of *ex parte* evidence) shipped its books of account, covering a period of ten years of its business, from Omaha, Neb., to Cincinnati, Ohio, and there presented the same to the board of appraisers for their investigation and consideration, coupled with an understanding between the Water Company and the appraisers that the appraisers would secretly receive the said evidence and would refuse to disclose the nature, force or effect of the said evidence. (rec. pp. 170, 93, 94, 95, 107.)

The city was not permitted to see the said books, although it demanded an opportunity to do so (rec. pp. 107, 170), and the city has never been advised of the contents thereof, nor to what extent the appraisers were influenced by the said books in fixing the value of the water works. It is manifest that the said books were the only source of information the appraisers had in finding the "going value" of the water works and may have had much weight in determining the cost of the construction of the works, as well as the purchase price of water pipes and pumping engines. (rec. p. 107.)

On the 7th day of July, 1906, the award was made fixing the value of the water works at \$6,263,295.49, which was signed by two of the appraisers, to-wit: Daniel W. Mead and G. H. Benzenberg, and which award was *not concurred* in by John W. Alvord, but who affixed to said report above his own signature, the words "*I do not concur in above report, nor in the value as fixed therein.*" (rec. pp. 159-165.)

The Omaha Water Company has extended its system of water works from the town of Florence on the north to the city of South Omaha on the south, and from East Omaha on the east to the town of Dundee on the

west, and is engaged in supplying the city of Omaha and the other four named municipalities with water.

The appraisers included in their valuation the entire water works system. (rec. pp. 159-165.) The city of Omaha contends that it is without corporate power to buy, or to levy a tax, or to issue bonds to pay for the outlying property. The Water Board of the city, by appropriate preamble and resolutions, rejected the award as illegal, null and void. (rec. pp. 166-169.) The Circuit Court held the award void and dismissed the bill. (rec. pp. 185-187.) The Circuit Court of Appeals held the award valid and directed the entry of a decree to that effect. (rec. pp. 732-746.)

ASSIGNMENT OF ERRORS.

There is error in the opinion and judgment of the Circuit Court of Appeals and of which the city of Omaha complains as follows:

First. The said court erred in holding that the report of the board of appraisers was legal and valid, notwithstanding the fact that John W. Alvord, one of the three appraisers, did not concur in the said award, whereas, said court should have held that the said award was illegal and void by reason of the fact that it was not concurred in by all of the three appraisers.

Second. The said court erred in holding that said award was of a public nature and that therefore, it was not necessary that the said award should be concurred in by the three appraisers, whereas, said court should have found and decreed that under the terms of section 14 of Ordinance No. 423, under which said appraisers were appointed and acted, that it was necessary to the

making of a valid award or appraisalment that the same should have been concurred in by all three of the appraisers.

Third. The said court erred in its opinion and judgment in holding that the appraisers, after having held open sessions and received oral and documentary evidence tendered by the respective parties between July 20, 1903, and Dec. 31, 1904, and on said last date listening to the oral and receiving printed arguments of the attorneys for the respective parties and then and there taking the matter under advisement, were not guilty of misconduct which vitiated the award in thereafter secretly, and against the protest of the city of Omaha, receiving in evidence the books of account of the Omaha Water Company and without allowing the representatives of the city of Omaha an opportunity to be present or to examine the said books or to produce any explanatory or counter evidence; whereas, the said court should have held that the receiving of said *ex parte* evidence under the circumstances was such misconduct as rendered the award null and void.

Fourth. The court should have found that the conduct of the appraisers in receiving in evidence, over the protest of the city, the books of the Water Company in Feb., 1906, more than a year after the taking of evidence tendered by the respective parties had been concluded, and the matter taken under consideration, and without permitting the books to be examined by the city rendered the award null and void; and the said court should have affirmed the ruling of the Circuit Court, wherein it held that said proceeding was such an irregularity as vitiated the award.

Fifth. The said court erred in holding that the two appraisers who signed the award acted within the scope

of their powers in estimating the going value of the Omaha Water Company at the sum of \$562,712.45, and lawfully and properly including the same in their estimate of the value of the property; whereas, said court should have found that the sum estimated for going value should have been excluded from the gross amount of said award.

Sixth. The said court erred in its holding and judgment that the city of Omaha had the corporate power and authority to purchase, and that the contract between the parties, and the election to purchase both contemplated the purchase of that part of the water works system lying without the city of Omaha and within the limits of South Omaha, East Omaha, Dundee and Florence, and used for the purpose of supplying said last named municipalities with water and not necessary or incidental to the supplying of water to the city of Omaha; whereas, the court should have held that the city of Omaha was without corporate authority to purchase the said outlying properties, and that the contract between the parties and the election to purchase did not contemplate the purchase of said outlying properties.

Seventh. The court erred in its order and judgment in directing a reversal of the decree entered by the Circuit Court and should have entered an order and judgment affirming the judgment of the Circuit Court dismissing the bill of complaint of the Omaha Water Company.

BRIEF OF THE ARGUMENT.

I.

THE AWARD IS VOID BECAUSE NOT CONCURRED IN BY THE THREE APPRAISERS. THE ELECTION TO PURCHASE UNDER SECTION 14 OF ORDINANCE 423 CONTEMPLATED THE VALUATION TO BE ASCERTAINED BY THREE APPRAISERS, NOT BY TWO APPRAISERS.

"Sec. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall *be ascertained by the estimate of three engineers*, one to be selected by the city council, one by the water works company and these two to select the third; Provided that nothing shall be paid for the unexpired franchise of said company." (rec. p. 686.)

The concluding part of the award reads as follows, (rec. p. 165):

"The valuation as made includes all schedules submitted to us of work and material included in the plant to January 1st, 1906.

Respectfully submitted,

DANIEL W. MEAD.

G. H. BENZENBERG.

"I do not concur in the above report, nor in the values as fixed therein.

JOHN W. ALVORD,

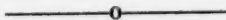
Board of Appraisers."

The contract was not that the city would purchase upon a valuation to be agreed to by a *majority*, nor by *two* of the appraisers. Neither is it a case where upon *disagreement* of the two that a third was to be selected, nor where a third was to be selected to act as umpire.

The contract in the case at bar, by its language and

by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that theory until the moment when it was finally determined that the three appraisers could not agree, whereupon for the first time, two appraisers assumed to make an award.

The law is universal in both England and America that a contract worded as in the case at bar, requires the joint concurrence of all the appraisers and that an award by two is void.



(a) The fact that each party selected an appraiser, and these two the third appraiser, does not give the right by implication or otherwise, to two appraisers to make an award, and an award so made and not concurred in by the third appraiser is void.

Willis v. Higginbotham, 61 Miss., 164.

Harvin v. Denton, 39 So., 456. (87 Miss., 238.)

Weaver v. Powel, et al., 23 Atl., 1070. (148 Pa. St., 372.)

Lowe v. Brown, 22 Ohio St., 463.

Stose v. Heissler, 120 Ill., 433.

Sherman v. Cobb, 10 Atl., 591. (15 R. I., 570.)

Memphis & Charleston Ry Co. v. Pillow, 56 Tenn., 248.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669.

Patterson v. Leavitt, 4 Conn., 50.

United Kingdom, etc., v. Houston, 1 Q. B. L. R., 567.

Willis v. Higginbotham, 61 Miss., 164, is a case where the court held the award void because not concurred in by all the arbitrators, and said, p. 166:

“The mere selection of an odd number of arbitrators does not, we think, sufficiently indicate an agreement that a majority may make the award.”

Harvin v. Denton, 87 Miss., 238, is a case where the contract was similar to the case at bar, in that it provided that each party should select an arbitrator and these two should select a third. The award was signed by two of the appraisers and it was held void because not signed by the third. The court said:

“It is perfectly manifest from the reading of this submission that all three of the arbitrators were required to investigate fully together the matters of difference, and to make together an award, and to certify and sign together said award.”

Weaver v. Powel, et al., 148 Pa. St., 372, is a case where the court held the award void for similar reasons and said:

“The submission was the contract between the parties. It did not provide for a majority award, and there was nothing in it to warrant an implication that they intended to accept one in settlement of their controversy. The award was not authorized by the submission and it is therefore invalid.”

Sherman v. Cobb., 15 R. I., 570, is a case where the third appraiser was selected by the other two for the purpose of appraisal of the value of property under a lease. The court said:

“Under the covenant, however, there is no agreement that the award shall be binding unless it is unanimous and therefore a mere majority award would not be binding under the covenant.”

Lowe v. Brown, 22 Ohio St., 463, is a case of appraisal by appraisers under covenants in a lease which provided: “The ‘ground’ thus leased should be ‘re-valued’ by three disinterested men, to be selected as fol-

lows: One by Brown, his heirs or assigns, one by the company or its assigns, and the third by the two thus chosen. It is further stipulated that 'these three persons thus chosen and appointed shall proceed to view the ground named in this indenture, and appraise the same at its true value.' " The court held the appraisement void, and said, p. 464:

"The appraisement and the written report are required to be made 'by *three* disinterested men.' The case is clearly within the rule, that, where a power or authority is intrusted to several persons to be exercised in relation to matters of a private nature, as distinguished from those of a public character, all must concur in order to its valid execution. The report, therefore, signed by two of the appraisers only, was of no validity, and was properly so regarded by the court below."

Memphis & Charleston Ry Co. v. Pillow, 56 Tenn., 248, is a case where the submission provided for three referees, each party to select one, these two to select "a third referee." Two agreed upon an award in favor of the railway company; the other referee published an award in favor of Pillow. The court, in construing the award, said, p. 250:

"By the terms of the submission, to constitute a valid award, it is essential that all the referees should unite in it. It is expressly stipulated that the three shall try the case, and that their decision shall be final, and bind the parties. It is not a case in which a majority may make a valid award, as there is no provision in the submission from which it can be inferred that it was intended that the award might be made by a majority of the whole number of arbitrators selected."

Patterson v. Leavitt, 4 Conn., 50, is a case where two signed the award and the third "entered his dissent

in writing on the back of the submission." The award was held to be void because not concurred in by all.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669, is a case of appraisal to value land taken by a railway company. The award was held void because signed by two and not concurred in by the third appraiser. The court said, p. 671:

"It has been decided that 'as a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all the arbitrators should concur in the award, unless it is otherwise provided by the parties.' *Green v. Miller*, 6 Johns. R., 39, *Huff v. Taylor*, 2 South, 829; *Kyd. on Awards*, 106. This is a common law rule, and the act of 1849 being silent on the point of concurrence, it seems to us that that rule is applicable to the proceedings stated in the complaint."

Stose v. Heissler, 120 Ill., 433, is a case of an appraisement under a lease which provided, "Each party of the first part and second part to select one man, and the said two selected to agree upon the third party." The court held the appraisal void because not concurred in by all, and said, p. 162:

"The plaintiff contends that provision for the selection of three persons to fix the rent indicates an intention that a majority might fix the rent, otherwise an odd number would not have been agreed upon. In this respect the submission does not differ from an ordinary submission to arbitrators, and the power of the referees to make a binding award should be construed in the same way." * * * "The confidence of the parties was in the united judgment of the three, and they agreed to be bound by nothing less than their concurrent judgment."

United Kingdom Mutual S. S. Asso. v. Houston, 1 Q. B. L. R., 567, is a case where the rule provided, in case of arbitration, p. 568:

"If three arbitrators be appointed, one shall be nominated by the member making the claim, one by the committee, and the third by the two so chosen before the reference is proceeded with."

In said case the award was signed by two of the arbitrators. The third refused to sign the award. The court held the award void. The court in its opinion said, p. 570:

"I think the action cannot be maintained. For a reference to three arbitrators means that all three must concur in the making of the award. In the view I take of the meaning of the rule it is true, as Mr. Walton has pointed out, that arbitration under it can seldom have any result; for it will be rarely possible to get all three to agree in their decision. But if the parties desired to have an effective arbitration they should have framed their rule differently. The question is not what the parties might reasonably be assumed to have intended, but what they have said that they intended. Here I think the principle to be applied is exactly the same as if three persons' names had been inserted in the reference. They must all agree."



(b) The rule of construction is that the contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all.

Richards v. Holt, et al., 61 Ia., 529, (16 N. W., 595).

Hubbard v. Great Falls Manf. Co., 12 Atl., 878, (80 Me., 39).

Lowe v. Brown, 22 Ohio St., 463.

Godfrey v. Knodle, 44 Ill., App., 638.

Oakley v. Anderson, 93 N. C., 108.

Mackey v. Neill, 53 N. C., 214.

Anderson v. Farnham, 34 Me., 161.

Owens v. Withee, 3 Texas, 161.

Stose v. Heissler, 120 Ill., 433.

United Kingdom etc., v. Houston, 1 Q. B. L. R., 567.

Richardson v. Holt, et al., 61 Ia., 529, is a case where the contract of submission provided that "the controversy be submitted to J. W. Holland, J. S. Baker, E. H. Wilson, E. Lawrence and D. K. Douthett * * * who are hereby authorized to find the facts and conclusions of law upon the matters above set forth." "Four of the arbitrators united in an award, the other did not concur." The court held the award void, and said, pp. 533-534:

"It is a well settled rule that, unless the submission provides otherwise, or consent to a majority award is in a proper manner shown, all the arbitrators must concur in the award."

The same was announced in *Hubbard v. Great Falls Manf. Co.*, 12 Atl., 878, (80 Me., 39). In that case two signed the award; the third did not concur. The court ruled that a less number than all could not make a valid award "without any express authority given, or to be inferred from the manner or circumstances of the submission."

In *Lowe v. Brown*, 22 Ohio St., 463, the court said, p. 466:

"That instrument does not provide that the appraisalment or report may be made by a majority of the appraisers. Nor can such authority be implied from its terms as may be done in cases where two, selected to make an appraisalment, are empowered, in case of a disagreement, to call in a third."

Godfrey v. Knodle, 44 Ill., App., 638, is a case where each of the parties selected an appraiser and these two

selected a third to appraise the valuation of property under a lease. The appraisement was signed by two, the third appraiser refused to concur, and the court in speaking of it used the following language, p. 641:

“While it is true that in the absence of an agreement to accept an appraisement by a majority of the appraisers, the parties were entitled to the concurrent judgment of all three, and an appraisement by two only was not binding, yet it was optional with appellant to accept the appraisement of Judd and Wadsworth or renounce it.”

In *Oakley v. Anderson*, 93 N. C., 108, the court held an award by two was void except it be *expressly agreed* that a less number may make the award and said, p. 112:

“The submission in this case was to five persons as arbitrators, and only three concurred in making the award. In *Norfleet v. Southall*, 3 Mur., 189, it was held that when a reference is made to several persons the concurrence of all is necessary unless it is *expressly agreed* that a less number make the award; and to the same effect is *Mackey v. Neill*, 8 Jones, 214.”

In *Mackey v. Neill*, 53 N. C., 214, the court announced the same rule and said, p. 215:

“It is a well settled rule of law, that all of the arbitrators must concur in making an award, unless it is provided otherwise by the terms of the submission, by inserting, ‘Their award, or the award of any two of them, shall be binding, etc.,’ which is the usual form.”

Anderson v. Farnham, 34 Me., 161, is a case where an award was held void because not agreed to by the three referees. The court said, p. 161:

“In this case they did not choose to agree to be bound by the judgment of a simple majority of the referees. The court has no authority to change the provisions of the rule adopted by them against the consent of either party. The defendant is

entitled to the judgment of the three referees. The report is made by two only."

In *Owens v. Withee*, 3 Tex., 161, the court said, p. 166:

"If it had been intended that five should be sufficient, the agreement should so have expressed it; but the fact of the substitution of one showed a determination that the number six should be kept up according to the original agreement. The award returned is not the act and decision of the six chosen for the purpose, and, according to authorities referred to, was null and void."

For a digest of *Lowe v. Brown*, 22 Ohio St., 463, *Stose v. Heissler*, 120 Ill., 433, *United Kingdom, etc., v. Houston*, 1 Q. B. L. R., 567, reference is made to the quotations therefrom under subdivision (a) *supra*.

(c) All must concur in the award to make it valid unless the parties have agreed that it may be made by less than all. Unless there is such an agreement clearly and unmistakably expressed the award will be held void when signed by two and not concurred in by the third.

Leavitt v. Windsor, etc., 54 Fed., 439.

Harryman v. Harryman, 43 Md., 140.

Byrd v. Harkrider, 108 Ind., 376.

Willis v. Higginbotham, 61 Miss., 164.

Weaver v. Powel, et al., 23 Atl., 1070. (148 Pa. St., 372.)

Eames v. Eames, 41 Conn., 177.

Towne v. Jaquith, 6 Mass., 46.

Green v. Miller, 6 Johns., 39.

Patterson v. Leavitt, 4 Conn., 50.

Nettleton v. Gridley, 21 Conn., 531.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669.

Smith v. Waldon, 26 Ga., 249.

Lattin v. Gamble, 154 Mich., 177-178.

In *Leavitt v. Windsor Land & Investment Co., et al.*,

54 Fed., 439, the Circuit Court of Appeals for the eighth circuit, said, p. 445:

“At common law, all those named as arbitrators must act, and they must all act together, and they must all concur in the award, unless the parties have agreed that it may be made by less than all.”

In *Harryman v. Harryman*, 43 Md., 140, the court said, p. 143:

“Apart from all other objections, as the order of reference, that being the only evidence of the submission, did not provide that a less number than the three named referees might make an award that should be binding upon the parties, the authority delegated has not been well executed. The delegation of such power is for a mere private purpose, and the authority being joint, it is necessary that all the arbitrators or referees should concur in the award, unless it be otherwise provided in the submission.”

In *Byrd v. Harkrider*, 108 Ind., 376, the court held an award void signed by two and not signed by the third arbitrator. The court said:

“The arbitration and award pleaded in this paragraph in bar of appellee’s action is a common law arbitration and award. In such an arbitration it is settled law that where, as here, the submission is to three citizens, and there is no agreement that two may act and render an award; all three of the arbitrators must meet, hear the proofs, and sign the award, to render it valid. *Jeffersonville Ry. Co. v. Mounts*, 7 Ind., 669; *Baker v. Farmbrough*, 43 Ind., 240; *Morse, Arb.*, 151-159-162.”

In *Eames v. Eames*, 41 Conn., 177, the court held an award signed by two “referees” and not signed by the third was void, and said, p. 181:

“In the case before us there is nothing to show any express or implied authority to a less number

than the whole of the referees to make a decision, but all the referees attended, considered the matters submitted to them, and united in making the award."

In *Towne v. Jaquith*, 6 Mass., 46, the court said:

"The jury have determined the fact to be, in the case at bar, that the parties, in their agreement to submit their disputes to three arbitrators, *used no expression which authorized two to decide*; and that an authority to this effect is not to be inferred from the manner or from any circumstances of the submission."

Patterson v. Leavitt, 4 Conn., 50, is a case where two arbitrators signed the award and the third, as in the case at bar, entered his dissent in writing. The award was held void. *Hosmer, Ch. J.*, said, p. 53:

"A submission to arbitration in Westminster Hall, as well as in the adjoining states of New York and Massachusetts, has been uniformly considered to be a delegation of power for a *mere private purpose*; and all the arbitrators must concur, unless it is otherwise provided by the parties."

In *Nettleton v. Gridley*, 21 Conn., 531, the court held an award void because the third arbitrator did not concur therein. The court said:

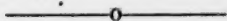
"There was no provision in the submission that any less number of arbitrators than the whole might make an award; and therefore, according to the doctrine of this court, as held in *Patterson vs. Leavitt*, 4 Conn., 50, the award published was of no effect."

In *Lattin v. Gamble*, 154 Mich., 177, the syllabus reads:

"The general rule is that where articles for a common-law arbitration by three arbitrators do not provide for an award by two of them; an award by two is not binding."

See digest of *Willis v. Higginbotham*, 61 Miss., 164,

Weaver v. Powel, et al., 148 Pa. St., 372, *Jeffersonville Ry. Co. v. Mounts*, 7 Ind., 669, under heading (a) *supra*.



(d) This case is clearly distinguishable from a case where it is provided by the terms of the submission that a third party, or umpire, is to be selected in the event of a disagreement of the other parties, for the reason that such form and terms of submission by implication clearly indicate that a unanimous award is not required and that a majority award is to be accepted. The submission in case at bar does not make the third man an umpire, neither does his appointment depend upon a disagreement between the other two.

There are cases which recognize the correctness of the rules as we have stated them in paragraphs *supra*, (a), (b) and (c), but hold that an exception exists in cases where the two appraisers selected by the parties, in the event they do not agree, are to select a third appraiser. In that situation the courts hold a third person so selected is to be treated in the character of an umpire. This distinction was ruled in *Hobson v. McArthur*, 16 Peters, 182. In that case the court said:

“A third man was not to be called in, unless the two disagreed; and it is an unreasonable construction of this agreement that it was so framed that it not only might fail to accomplish the very object intended, but that, in all probability, it must fail and become entirely nugatory, as the third man was not to be called until the two had disagreed.” * * * “It is a more reasonable construction to consider the third man in the character of an umpire to decide between the two that should disagree.”

For other similar cases see the following: *Home Ins. Co. v. S. Schiff's Sons*, 103 Md., 648, *Kilderhouse v.*

Hall, 116 Ill., 147, *Knowlton v. Homer*, 30 Me., 552, *Fish v. Vermillion*, 70 Kan., 348, *Brush v. Fisher* 70 Mich., 469.

(e) The rule which requires the concurrence of the three appraisers to a valid award, where each party selects one appraiser and the two select the third appraiser, applies with equal force to the valuers or appraisers of property as to arbitrators.

The engineers selected to ascertain the valuation of the water works, under section 14 of ordinance No. 423, in the receiving of evidence and in the making of the award, were to be governed by the same rules as govern arbitrators as set forth in the previous chapter of this brief. That is to say, in the case of appraisers or valuers of property, where each of the parties selected an appraiser and the two appraisers so selected are to choose a third, and the valuation of the property is to be ascertained by the three, an award signed by two and not concurred in by the third is void.

This is sustained by the following authorities from which excerpts have been heretofore quoted *supra*:

Sherman v. Cobb, 10 Atl., 591. (15 R. I., 570.)

Lowe v. Brown, 22 Ohio St., 463.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669.

Stose v. Heissler, 120 Ill., 433.

Godfrey v. Knodle, 44 Ill., App., 638.

Other cases are hereafter cited under the chapter relating to the misconduct of the appraisers in receiving *ex parte* evidence where it is held that appraisers or valuers of property are governed by the same rules as govern arbitrators as to the manner of receiving evidence, giving notice of meetings, etc.

In the case at bar the appraisers, from the beginning of their proceedings, July 20, 1903, as well as the representatives of the respective parties, acted upon the theory that it would be necessary for the three appraisers to agree upon the valuation to be fixed upon the water works. At no time prior to the signing of the award, July 7, 1906, was there any suggestion by anyone that two of the appraisers could make a valid award not concurred in by the third. All parties understood that the appraised valuation should be "ascertained by the estimate of *three* engineers," not by two engineers, much less by two engineers over the protest and objection of the third engineer.

It is a matter of common knowledge that it is the prevailing custom in insurance policies and other similar contracts to make a special provision that a majority may make the award or that two appraisers may be appointed and in case of *disagreement* the two may select a third to act as *umpire*. If the city and Water Company had contemplated that an award by two would have been sufficient they could have so provided, as is frequently provided in other cases. The fact that they did not so provide emphasizes our point that the valuation was to be ascertained by the concurrent judgment of three engineers. It is no answer to say that there would be a great probability that three engineers might not agree. The parties to the contract knew of that probability as well as the court could know of it. Nevertheless, they contracted for a *joint* award. Such an award may have been contracted for because the parties wanted to be sure that neither of them should be overreached by any subtle influences that might be exercised over a mere majority.

II.

THE CASE AT BAR IS NOT A PUBLIC APPRAISEMENT WHICH WOULD JUSTIFY AN AWARD BY A MAJORITY OF THE APPRAISERS. SUCH RULE ONLY PREVAILS IN CASES OF INTERNATIONAL CONTROVERSIES, OR WHERE THE APPRAISERS ARE APPOINTED UNDER A PUBLIC LAW OF THE STATE AND ARE ACTING IN A PUBLIC OR QUASI-JUDICIAL CAPACITY.

It has been frequently ruled that contracts between cities and water companies and gas companies, etc., similar to the case at bar, are business contracts and are to be construed and dealt with as are contracts between private individuals.

Omaha Water Co. v. City of Omaha, 147 Fed., 1.

Wagner v. City of Rock Island, 146 Ill., 139.

Illinois Trust, etc., v. City of Arkansas City, 76 Fed., 271.

App. of Brum, 12 Atl., 855.

Safety Insulated Wire & Cable Co. v. Mayor and City Council, 66 Fed., 140.

Cincinnati v. Cameron, 33 Ohio St., 336.

The Court of Appeals disposed of this point in the case by holding that this appraisalment was a matter of public concern as distinct from an appraisalment under a contract, and cited in support of its conclusion the following cases: *Colombia v. Cauca Co.*, 190 U. S., 524; *Grindley v. Barker*, 1 Bos. & P., 229; *King v. Beetson*, 3 Term., 592; *Withnell v. Gartham*, 6 Term., 388; *Gas Co. v. Wheeling*, 8 W. Va., 320; *Green v. Miller*, 6 Johns., 39; *Ex parte Rogers*, 7 Cow., 526; *Downing v. Rugar*, 21 Wend., 178; *Crocker v. Crane*, 21 Wend., 211; *People v. Nichol*, 52 N. Y., 478; *The People v. Walker*, 23 Barb., 304; *Young v. Buckingham*, 5 Ohio, 485; *Patterson v.*

Leavitt, 4 Conn., 50; *Eames v. Eames*, 41 N. H., 177, 181.

No one of said cases meets the question in hand.

This court, in the Colombia case, put stress upon the following points:

(a) That Colombia had taken over the railroad and had not offered to rescind, and was therefore not in a position to dispute the award.

(b) That the arbitration was between a sovereign state and a railroad company, declared by a law of Colombia to be a work of public utility.

(c) The Commission "had itself resolved, under the powers given to it in the agreement, that a majority vote should govern," and had so acted during the whole course of its labors. The Colombia case falls within the exception to the general rule upon the proposition that it was one of international and public concern, in which not only the national government of the Republic of Colombia was interested, but in which the United States became interested and the secretary of state appointed one of the appraisers.

The said case is, therefore, distinct from a case where the appraisers were appointed by the parties to a contract under a contractual agreement to deal with matters of business concern.

The *Wheeling Gas* case is not in point for the reason that the act of the legislature of Virginia, which created the company, provided in the said act for the appointment of the appraisers in the event of the election to purchase. In that case it was not a matter of contract between the city and the gas company, but a matter arising only under a *public law*.

In any event, in the *Wheeling* case, all that was said on the point was but an expression of the views of the writer of the opinion, which left the question open to

future discussion, and was not the point on which the case was decided. This will be seen by what the writer of the opinion said in conclusion upon the subject: "But on account of the seeming confusion of the authorities on the subject, and as I do not deem it material under the view I take of the award in other respects to finally determine it now, the right to reconsider and re-examine the question in a proper future case is reserved and left open."

Grindley v. Barker, 1 Bos. & Pull., 229, was not a case of appraisers under a contract, but of "searchers" appointed under a public law to perform a public duty, to-wit: Under an act of Parliament concerning tanners. They were public officers acting in the performance of a public duty and in no sense of the word were they appraisers or arbitrators.

King v. Beetson, 3 Term., 592, is a case of church wardens acting under an act of Parliament. In that case, Kenyon, chief justice, held that the statute under which they acted provided that a majority might act.

Withnell v. Gartham, 6 Term., 388, is not a case of appraisal but of an appointment of a school master by the vicar and a majority of the church wardens.

Green v. Miller, 6 Johns., 39, is a case where the court held the award void because signed by four, the fifth not signing. The point ruled by the Circuit Court of Appeals is not in the case.

Ex Parte Rogers, 7 Cow., 526, is a case of damages assessed by canal commissioners, appointed under an act of the legislature of 1825. The commissioners are described by the court as a tribunal appointed by law to act in a matter of public concern. Confessedly they were acting as public officers in an official capacity. In that

case the court said that in arbitration proceedings "the whole body must be unanimous."

In *Downing v. Ruger*, 21 Wend., 178, the court stated the rule in the following language, p. 182:

"The rule seems to be well established, that in the exercise of a public as well as private authority, whether it be ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number is such as to admit of a majority, that will bind the minority, after all have duly met and conferred."

The above quotation recognizes our point of contention, to-wit: That to justify an award by a majority the *authority must come from the public*. In all other cases, including those where the appraisers appointed by the parties under contract, even though acting in a public matter, all must join in the award.

Crocker v. Crane, 21 Wend., 211, is a case of commissioners appointed under an act of legislature incorporating a railroad company to receive subscriptions to the capital stock, not a case of appraisers appointed by the parties under a contract.

People v. Nichols, 52 N. Y., 478, is a case where three persons were named by an act of the legislature of New York to appraise certain relics of George Washington. The court held that a certificate by two was sufficient because they were public officers, acting under a public law, but in that case Grover, J., delivered a dissenting opinion.

The People v. Walker, 23 Barb., 304, is a case of jury commissioners provided for under a statute of the state, not a case of appraisers appointed under contract, and in that case it was said that when private authority is

conferred on several all must be present and all must concur, unless provision be otherwise made.

Young v. Buckingham, 5 Ohio, 485, is a case of commissioners appointed by the court under a law of the state to condemn land for a public canal. It was held in that case that a majority of the commissioners might make an award but because they were acting as public officers in a judicial capacity.

Patterson v. Leavitt, 4 Conn., 50, is a case where the court held the award void because agreed to by two, and where the third, as in the case at bar, entered his dissent in writing on the back of the submission.

Eames v. Eames, 41 N. H., 177, is a case where the court held the arbitration *void* because not concurred in by the three arbitrators.

(a) A public appraisement, within the meaning of the law, is one where the appraisers or arbitrators are appointed under a state or national law and act as *quasi* public officers in the performance of a public duty.

Grindley v. Barker, 1 Bos. & Pull., 229.

King v. Beetson, 3 Term., 529.

Withnell v. Gartham, 6 Tenn., 388.

Ex Parte Rogers, 7 Cow., 525.

Sinclair v. Jackson, 8 Cow., 543.

Young v. Buckingham, 5 Ohio, 485.

State v. McMillan, 29 S. E., 540. (52 S. C., 60.)

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 B. & C., 314.

(b) To make an appraisement a public one, as distinct from a private one, the appraisers must be appointed under and act under the authority of a general law, as *quasi* public officers. See cases cited *supra*. Also the following cases:

Cooley v. O'Connor, 12 Wall., 391.

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 Barn. & Cress., 314.

The King v. Whitaker, 9 Barn. & Cress., 648.

People v. Walker, 23 Barb., 304.

People v. Coghill, 47 Cal., 361.

Hewitt v. Craig, 5 S. W., 280. (9 Ky. Law Rep., 232.)

The rule is very well stated in *Cooley v. O'Connor*, 12 Wall., 391, p. 398:

"It is true that when an authority is given jointly to several persons they must generally act jointly, or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."

We are not aware of any case in which the appraisers were selected by the parties pursuant to a contract between them which rules that such an appraisal is to be regarded as a *public* appraisal in the sense and to the extent that two may make an award when the third does not concur, unless it be a case where it is so provided in the contract. All of the cases which rule the point that a majority may make the award on the ground that the appraisal is a public appraisal are cases where the appraisers were appointed under a public law of the state and were clothed with public authority, acting for the state under its authority. It is no answer to our claim to say that the Water Company is performing a *quasi* public service. That is aside from the point. The appraisers in the case at bar are not *public officers* and are not clothed with *public authority*. They were selected by the parties under the terms of a contract between the city and the Water Company to settle a business matter between them, to-wit: The ascertainment of the value of the water works.

III.

MISCONDUCT OF THE APPRAISERS.

THE AWARD IS VOID BECAUSE THE APPRAISERS CONCLUDED THE FORMAL HEARING OF TESTIMONY AND THE ARGUMENTS OF ATTORNEYS FOR THE RESPECTIVE PARTIES ON THE 31ST DAY OF DECEMBER, 1904, AND AFTERWARDS IN FEBRUARY, 1906, IN THE CITY OF CINCINNATI, PRIVATELY AND AGAINST THE PROTEST OF THE CITY OF OMAHA, RECEIVED AND SECRETLY EXAMINED, EX PARTE, THE BOOKS OF THE WATER COMPANY, AND UNDER AN UNDERSTANDING THAT THE CITY OF OMAHA SHOULD NOT BE PERMITTED TO SEE OR KNOW THE CONTENTS OF SAID BOOKS.

The question to be considered involves a moral principle. The incident complained of did not give the city a "square deal." The facts are as follows:

Between the date of the organizing of the board, July 20, 1903, and the 31st day of December, 1904, the board held many sessions in the city of Omaha, and the Water Company and the city produced witnesses before the board which were sworn and examined, and some 2,000 pages of typewritten evidence were introduced (rec. p. 161), and filled five volumes (rec. p. 142), and there were also hundreds of plans and blue prints and several hundred pages of inventory. (rec. p. 161.) The attorneys for the respective parties made their arguments, orally and by printed briefs, on the 31st day of December, 1904, and at which date the board took the valuation under advisement. (rec. pp. 133, 161, 491.)

Subsequently a meeting of the board was called to be held at Cincinnati, Ohio, February 7, 1906, (a year and two months after the submission), although two of the appraisers, Mr. Mead and Mr. Alvord, lived in Chicago,

and Mr. Benzenberg lived in Milwaukee. No notice of this meeting was given to the city, but the Water Company were advised as per the following letter, (pp. 156-157):

"Madison, Wisconsin, Jan. 3, 1906.

"Omaha Water Company, Omaha, Neb.:

"Gentlemen: I duly received the inventory recently sent; also on a previous date the blue print inventory showing additions to the system since the last schedule submitted, as well as the subdivision of the system between the various municipalities.

"I wish you would kindly send two more copies of these blue prints for use of the other appraisers. We will get along with the single copies of the inventories.

"Our next meeting will be held in Cincinnati on February 7th, 8th, 9th and 10th. We should like to have the books of the company brought to Cincinnati at that meeting. Our headquarters will be the Grand Hotel. I will advise you by wire or otherwise promptly, if any change takes place in our present arrangements.

"Yours very truly,

"(Signed)

DANIEL W. MEAD.

"Chairman Board of Appraisers, Omaha Water Works."

During the time when the parties were submitting their evidence before the board at its sessions in the city of Omaha the question arose whether the books of the Water Company should be submitted to the appraisers. Mr. C. C. Wright, in behalf of the city, demanded that if said books should be presented or examined that the city should have an opportunity to see and examine the same and objected "to the said books being presented to the appraisers unless the city, by its attorney, had an opportunity to be present and examine regarding the same."

The above facts are testified to by Mr. Fairfield, general manager of the Water Company. (rec. p. 92.)

Mr. Mead, the chairman of the board of appraisers, wrote the above letter suggesting that the Water Company send its books to the meeting to be held at Cincinnati. The manager of the Water Company sent its books, "the journals and ledgers and voucher registers for ten years from 1896 to 1905, inclusive," comprising "thirty large books," to Cincinnati. (rec. p. 94, folio 107.)

Mr. Fairfield, the manager of the company, and Mr. Heth, the treasurer of the company, went from Omaha to Cincinnati to be present at said meeting (rec. pp. 92-93) and explain the reason therefor, as follows (rec. p. 94):

"Q. And why did you and Mr. Heth go to Cincinnati? A. Because it was suggested by the board that it might help them to have someone on the spot to explain the methods of bookkeeping—save them time. Q. How was that suggested by the board? A. That was suggested in another letter from Mr. Mead."

Mr. Fairfield and Mr. Heth remained in Cincinnati over the 7th, 8th, 9th and 10th of February. The books were delivered to the board and opened and examined by the board. (rec. p. 94.) Mr. Fairfield did not give the city any notice that he had received the said letter from Mr. Mead or that he had shipped the books to Cincinnati, but he did understand that the city's objection to the *ex parte* examination of the books still held good. (rec. p. 93).

"Q. You did know, however, that Mr. C. C. Wright, representing the water board and the city of Omaha in the matter, objected to said books going before the appraisers unless he should be present or have an opportunity to examine relating thereto? A. Yes, I supposed the same objection held good."

Mr. C. C. Wright, incidentally learning that the said books had been shipped to Cincinnati, wrote a letter to the chairman of the board protesting against the receipt and examination of the books by the appraisers unless the city "should have an opportunity to be present when the books are submitted" and "be permitted to offer such testimony as it may be advised pertinent or material to the matters so contained in the said books." (rec. pp. 170-171.)

Mr. Fairfield, the manager of the Water Company, recites in his testimony that he was present before the board at their meeting in Cincinnati when the appraisers had under discussion the "method they should pursue with reference to the examination of the books" and at that time the board called his attention to the said letter of protest from the city. (rec. p. 95.)

"Q. Did you know at that time that Mr. C. C. Wright, in behalf of the water board of the city, had sent to Daniel W. Mead, as chairman of the board, a written protest against the board examining these books unless he should be present and permitted to cross examine? A. Yes, sir, they informed me to that effect. Q. That is, the board informed you? A. Yes, sir. Q. Was that information given to you at the time when you were in the room where the board met at Cincinnati, Ohio? A. Yes, as I remember it, Mr. Wright's letter was handed me to read."

The record proceeds, pp. 106-107:

"Q. Mr. Fairfield, when Mr. Daniel W. Mead of Cincinnati showed you the letter of Carl C. Wright protesting against the examination of the books by the board unless he should be present and permitted to cross-examine, what was said between you and Mr. Mead, if anything, regarding that examination of the books under the circumstances? A. Well, I think all that was said was that they had received this protest on

behalf of the city of Omaha and turned it over to me to read, and asked me what I had to say in reference to it. Q. And what did you say? A. I said in effect that I did not see why they should care whether the city or anyone else protested against the receiving of books or any other testimony if the board chose to receive it, that we had sent the books down at their request, the books were there and we were there to expedite their checking if they needed us and I assumed that they would adopt a simple method of taking the books and verifying the statements from them. I think that was about the amount of my comment."

Mr. Fairfield states that the letter was shown to him and the foregoing conversation occurred in the room in the presence of all the appraisers, and that he did not give his consent that the books should be investigated by the city or that the city's representatives should be present when the books were examined because he regarded the contents of the books as "confidential information" (rec. p. 107), but that he did understand that the books were sent to Cincinnati to aid the board in arriving at the valuation of the water works. (rec. p. 107.)

"Q. Well, you understood at the time, yourself, that the purpose of examining the books and the purpose for which they were sent to Cincinnati was to assist the board *in arriving at a valuation of the water works*? A. I assumed that it was for that purpose, yes."

After the examination of the books at Cincinnati, the books were transmitted to an auditing company in Chicago for the purpose of making a report thereon to the appraisers (rec. p. 97), and Mr. Heth, the treasurer of the Water Company, went from Cincinnati to Chicago to "give the auditors any information or help that he could in reference to checking the books." (rec. p. 9.)

Prior to said date it appears that the Water Company had also delivered "a statement from the books * * * to Mr. Mead, as chairman of the board of appraisers." (rec. p. 98.) These books which were sent by the Water Company to Cincinnati, and which were thereafter transmitted to Chicago, were books that were in the office of the Water Company at Omaha during the time when the testimony was being taken in said city, being 30 or 40 books in number. (rec. p. 99.)

Mr. Heth stated that his purpose in going to Cincinnati was "to assist, if possible," in explaining to the "appraisers" the manner of keeping the books" and "to facilitate matters if there was any occasion." (rec. p. 100).

"Q. What did Mr. Mead say to you that caused you to go to Chicago? By Mr. Hall: Objected to as hearsay and incompetent. A. Well, he stated that the books were to be placed in the hands of an auditing company for the purpose of auditing and he thought that I might be of some assistance to the audit company in stating our system of keeping books and might facilitate matters there to some extent."

While Mr. Heth was in Chicago he had two interviews with Mr. Mead "at his offices in the First National Bank Building in Chicago" relating to the said books. (rec. p. 102).

Comment. The foregoing facts are found in the evidence of Mr. Fairfield, general manager, and Mr. Heth, treasurer, of Omaha Water Company. It is perfectly manifest from said testimony that the Water Company knew that the city protested at the time of the taking of the evidence in Omaha against an *ex parte* examination of the books by the appraisers. The city did not object to the Water Company offering the books in evidence in

the same manner and form as other evidence was tendered and as other maps, plans and plats were tendered in evidence, but insisted that the city should have a right to be present if the books were offered in evidence by the Water Company. This insistence was within the legal rights of the city. It stands admitted that the board of appraisers began the taking of the testimony in open session July 20, 1903, and that course continued at the convenience of the parties until December 31, 1904. Evidence which filled five volumes containing over 2,000 pages of typewritten matter was taken and hundreds of maps, plans, plats and blue prints were offered in evidence. The witnesses were sworn examined and cross-examined by counsel. At the conclusion of the taking of the testimony the case was argued orally and by printed briefs by the several attorneys for the parties.

Now it appears that one year and two months after the formal taking of evidence had been concluded and the case submitted the Water Company shipped thirty volumes of its books from its offices in Omaha to Cincinnati, Ohio, and in said city delivered them to the appraisers for their inspection and examination. The appraisers gave no notice to the city of the meeting to be held in Cincinnati. No notice was given to the city that the books of the Water Company would be transmitted to Cincinnati for the examination of the appraisers. Why this secret proceeding? Why this departure from the method which had been pursued for a year and one-half in the manner of taking testimony? Why submit to the appraisers this "confidential information" which could bear only upon one side of the matter in controversy? Why forbid the city an opportunity to know whether these books were genuine or fabricated? Why forbid the city an opportunity to inspect, examine and produce counter

evidence if it desired? It is not to be forgotten that during the year and one-half that the appraisers were hearing evidence in Omaha these identical books were then in the adjoining building reasonably accessible. Why ship them to Cincinnati some 700 miles away and then from Cincinnati to Chicago for further examination? Why should the manager of the Water Company appear before the board of appraisers at Cincinnati when the books were being examined? Why should Mr. Heth, the treasurer of the company, hold two conferences with Mr. Mead at his private office in Chicago relating to these books? What right had the appraisers as a body to receive this *ex parte* evidence presented in this clandestine manner? What right had the officers of the Water Company to appear at Cincinnati and at Chicago to assist the appraisers in gathering information from these books? *Our insistence is that this conduct on the part of the officers of the Water Company and upon the part of the appraisers vitiated the award.*

It is not a question whether the appraisers intended to act wrongfully in receiving this *ex parte* evidence. It is not a question whether they were acting with corrupt motives or with fraudulent intent. It would be impossible for the city to prove that the board of appraisers were influenced by corrupt motives. The law steps in and declares that such conduct in and of itself vitiated the award and that it is not necessary for the city to introduce evidence showing fraudulent intent or corrupt motives. The law goes one step farther and adds that the Water Company being itself guilty of producing this *ex parte* evidence with knowledge that the city protested against it, and knowing that the appraisers made the examination of the books, notwithstanding the protest of the city, and with the understanding between the apprais-

ers and the Water Company that the information contained in the books should be strictly confidential, knowing these things and being guilty of these things *the Water Company cannot be heard in a court of equity to say that the appraisers were not improperly influenced by said evidence.*

It is no answer to our suggestion for the Water Company to say that at the time when the board organized, July 20, 1903, there may not have been an unanimity of sentiment between the board of appraisers and the attorneys for the respective parties as to the proper method of procedure or as to the powers and duties of the said board. Suffice it to say that after the board had heard the views of the respective parties in interest it was agreed between all concerned that the testimony should be taken in open session, the witnesses should be sworn and examined and cross-examined by the attorneys, and eventually, the case argued by the attorneys precisely as a case would be presented before a board of arbitrators, and *that method was pursued until December 31, 1904.* This committed everybody to that manner of procedure. From that time on all the parties were bound by it independent of the question whether it rested in consent, by agreement, or legal right. It was equally wrong and reprehensible for the Water Company to present, and for the board of appraisers to receive, this *ex parte* evidence, coupled as it was with an understanding with the board of appraisers that the city should not be permitted to be present nor to offer explanatory or counter evidence.

(a) The conclusions warranted by the reported cases are that the *ex parte* examination by the Board of Appraisers of the books of the Water Company at Cincinnati and against the protest of the City of Omaha, and

without giving the City of Omaha an opportunity to examine said books or to be heard, was such misconduct as makes the award void.

- Emery v. Owings*, 7 Gill., 448.
Bassett v. Harkness, 9 N. H. 164.
Jenkins v. Liston, 13 Grat., 535.
Rand v. Peel, 74 Miss., 305.
Natl. Bank of Republic v. Darragh, 30 Hun., 29.
Warren v. Tinsley, 53 Fed., 689.
Cameron v. Castleberry, 29 Ga., 495.
Walker v. Frobisher, 6 Ves., 69.
Strong v. Strong, 9 Cush., 560.
Hewitt v. Village of Reed City, 124 Mich., 6.
Vessel Owners' Towing Co. v. Taylor, 126 Ill., 250.
Elmendorf v. Harris, 23 Wend., 638.
Dobson v. Groves, 6 Q. B., 637.
Western Female Seminary v. Blair, 1 Dis., 370.
In re Plews and Middleton, 6 Q. B., 845.
In re Tidswell, 33 Beav., 213.
Passmore v. Pettit, 4 Dall., 270.
Wood v. Helme, 14 R. I., 325.
Jackson v. Roane, 90 Ga., 669.
Wilkins v. Van Winkle, 78 Ga., 557.
Rosenau v. Legg, 82 Ala., 568.
Knowlton v. Mickles, 29 Barb., 465.
Sisk v. Gary, 27 Md., 401.
Cleland v. Hedley, 5 R. I., 163.
Lattin v. Gamble, 154 Mich., 177-181.
Lutz v. Linthicum, 8 Peters, 165.
McFarland v. Mathis, 10 Ark., 560.
Eastern Counties Ry. Co. v. Eastern Union Ry. Co.,
 68 Eng. Ch., 609.

Emery v. Owings, 7 Gill., 448, is a case in point on the facts. Arbitrators were appointed under a clause

in a contract to appraise the cost of construction of a private road and, among other things, examined *ex parte* books of account. The court held the award void on account of this misconduct of the arbitrators, and said:

“Again the conduct of the arbitrators in examining the books of Emery & Gault, without notice to and in the absence of the respondents, and without proof of the correctness of the statements and entries in those books, was conduct so inconsistent with all the principles of law recognized in the impartial administration of justice as would vitiate and render null and void their award.”

Jackson v. Roane, 90 Ga., 669, is a case where the arbitrators heard evidence offered by the respective parties and closed the hearing. Subsequently the arbitrators received evidence offered by one party without notice to the other party. The court held the award to be void without proof on the part of the defendant that he was injured thereby.

“In this exception it was complained that the award was illegal because of the improper conduct of the arbitrators in bringing before themselves one Vickers, after the testimony on both sides was closed, and taking his *ex parte* statement in the case, without notice to Roane or his counsel, and without affording them an opportunity to examine him.”

To the point that this misconduct on the part of the arbitrators rendered the award void, the court said:

“Misconduct of the kind here shown is of itself a sufficient ground for setting aside the award, and this is so whether fraud is charged or not.”
* * * “Certainly the complaining party, after showing these facts, will not be required to go further and probe the mind of each arbitrator, and show that the testimony thus improperly received operated against him in the making up of the awards. It was incumbent

rather upon the party who procured its introduction to show, if he could, that it was harmless."

In *Dobson v. Groves*, 6 Q. B., 637, Lord Denman, C. J., said, p. 648:

"But, where a party wishing to be present has been excluded from the meeting, the opportunity of setting right what was irregular is past. The mischief was done at the time, and cannot be removed."

All of the cases cited *supra* under (a) are in harmony with the excerpts quoted and for like reasons ruled the award to be void.



(b) The receiving of *ex parte* evidence—the books of the Water Company—after the public taking of evidence had been closed and arguments of attorneys made, aggravates the misconduct and the award is void.

Walker v. Frobisher, 6 Ves., 69.

Jackson v. Roane, 90 Ga., 669.

Catlett v. Dougherty, 114 Ill., 568.

Wilkins v. Van Winkle, 78 Ga., 557.

Hewitt v. Village of Reed City, 124 Mich., 6.

Rosenau v. Legg, 82 Ala., 568.

Dobson v. Groves, 6 Q. B., 637.

Knowlton v. Mickles, 29 Barb., 465.

Western Female Seminary v. Blair, 1 Dis., 370.

Sisk v. Gary, 27 Md., 401.

Cleland v. Hedley, 5 R. I., 163.

Bassett v. Harkness, 9 N. H., 164.

Rand v. Peel, 74 Miss., 305.

Walker v. Frobisher, 6 Ves., 69, is in point. In that case "several witnesses had been examined on both sides in the presence of the parties or their attorneys." At

a later day "three persons attended on the part of the defendant; and the arbitrator examined those three persons," the plaintiff not being represented. The Lord Chancellor said, p. 71:

"This award cannot be supported. The arbitrator, having been named by the late Lord Chancellor, is, I am well assured, a *most respectable man*; but he has been surprised into a conduct, which upon general principles must be fatal to the award." * * * "He had examined different witnesses at different times in the presence of the parties." * * * "After this he hears these other persons, and he admits he took minutes of what was said. It did not pass as mere conversation. It does not appear that he afterwards held any communication with the other party or disclosed what was passed to him; but the arbitrator swears, it had no effect upon his award. I believe him. He is a most respectable man. But I cannot, from respect for any man, do that which I cannot reconcile to general principles."

Knowlton v. Mickles, 29 Barb., 465, is a case where the appraisers of damages to certain premises made an examination of the premises in dispute in the absence of the defendant, and then called before them two persons from whom they listened to *ex parte* statements of their knowledge of the damage to the premises. The court held the award void, and said:

"In the present case, the statements of *Van Wart and Cypher* were called for by the arbitrators themselves, and were given at their request, in the presence of the plaintiff. This is quite as strong a circumstance to show that the information acquired was considered material, and not to be mere conversation, as if such information had been reduced to writing." * * * "It has been said by many of the judges that it is impossible for the courts, or even for arbitrators themselves, to say what influence such state-

ments may have had upon them. We must go upon the general rule which condemns such a practice."

Sisk v. Gary, 27 Md., 401, is a case where the arbitrators received an *ex parte* statement after the hearing had been closed. The court said, p. 419:

"Where, after the hearing was closed, the arbitrators received a statement from one of the parties, containing new and different items of claim from any presented at the hearing and without the knowledge of the other party, a Court of Equity will enjoin a suit at law upon, and set aside the award. 2 *Story Eq.*, 1452-3, and authorities there cited."

The three cases quoted from are in harmony with all the cases cited *supra* under (b).



(c) The court will not permit an inquiry into the effect of the *ex parte* evidence, but will set aside the award.

Jenkins v. Liston, 13 Grat., 535.

Catlett v. Dougherty, 114 Ill., 568.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Cleland v. Hedley, 5 R. I., 163.

Knowlton v. Mickles, 29 Barb., 465.

In *Jenkins v. Liston*, 13 Grat., 535, the court said, pp. 538-539:

"It may therefore be safely declared that an award cannot be sustained if made in favor of a party who has secretly offered evidence which has been received by the arbitrators whilst acting in their capacity as such." * * * "The law in its jealousy will not permit an inquiry into the effect of the evidence so received; it tends to partiality

and corruption, and nothing less than the complete vacation of the award will satisfy the law."

In *Hewitt v. Village of Reed City*, 124 Mich., 6, Montgomery, C. J., said:

"The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is *not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not.* *Walker v. Frobisher*, 6 Ves., 70; *Strong v. Strong*, 9 Cush., 560; *Catlett v. Dougherty*, 114 Ill., 568 (2 N. E., 669); *Jenkins v. Liston*, 13 Grat., 535; 2 Am. & Eng. Enc. Law (2nd Ed), 646." * * * "We think the safer rule is for the court to enter into no examination as to whether the arbitrator is in any way influenced by *ex parte* communications."

Cleland v. Hedley, 5 R. I., 163, is a case where, after the taking of evidence had been concluded, one of the arbitrators requested and received a statement from one of the parties, and the award was held void.

"The result of these cases (and many others might be added) seems to be, that an award cannot be upheld, where the arbitrator has received evidence from witnesses, of which the party had no notice, and no opportunity to be heard in reply. Still less can it be upheld, where information has been received from a party to the cause, of which the other party has no notice, and which may, from its nature, bias the mind of the arbitrator in his judgment upon the facts; and the rule would be the same if the information came from the counsel or agent of the party. And the court will only inquire in such case, whether the communication be of such a nature as might influence the judgment of the arbitrator in the cause. If they find it to be of that character, they will not stop to inquire whether, in point of fact, he gave weight to it, or his award was varied by it. Nor will they permit the arbitra-

tor to say, that evidence or information, improperly received by him, and which, from its nature, was calculated to, and more especially if it was designed to, influence his determination, did not have its natural effect upon his mind."

(d) It was not necessary for the City of Omaha to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence.

Warren v. Tinsley, 53 Fed., 689.

Elmendorf v. Harris, 23 Wend., 628.

Ingraham v. Whitmore, 75 Ill., 24.

Alexander v. Cunningham, 111 Ill., 511.

Jackson v. Roane, 90 Ga., 669.

Moshier v. Shear, 102 Ill., 169.

Shipman v. Fletcher, 82 Va., 601.

In *Warren v. Tinsley*, 53 Fed., 689, the court said, p. 692:

"The doctrine is well established that, where an arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator. *Elmendorf v. Harris*, 23 Wend., 628; *Lutz v. Linthicum*, 8 Peters, 178, and authorities there cited, *Ingraham v. Whitmore*, 75 Ill., 24. *Ingraham v. Whitmore* is approved, and the same rule is applied, where an umpire was called in on disagreement of the arbitrators; in *Alexander v. Cunningham*, 111 Ill., 511, 'An arbitrator greatly errs if he in any—the minutest—particular takes upon himself to listen to evidence behind the back of any of the parties to the submission.' *Drew v. Leburn*, 2 Macq. H. L. Cas., 1."

Ingraham v. Whitmore, 75 Ill., 24, is a case where the court said, p. 30:

"It is not necessary to show corruption on the part of the arbitrator. *Elmendorf v. Harris*, 23 Wend., 628; *Lutz v. Linthicum*, 8 Peters, 178, and authorities cited."

In *Alexander v. Cunningham*, 111 Ill., 511, the court said, p. 516:

"The doctrine is well established that where an arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator. *Elmendorf v. Harris*, 23 Wend., 628; *Lutz v. Linthicum*, 8 Peters, 178, and authorities cited."

Moshier v. Shear, 102 Ill., 169, is a case where an award was void because one of the arbitrators had a private conversation with a third party. The court said, p. 576:

"To sustain this award would be to sanction and justify the means by which the whole system of arbitration would be perverted and corrupted. If we hold that the party thus objecting must prove that undue influence actually resulted, then the objection would seldom be available however corrupt the influence."

In *Shipman v. Fletcher*, 82 Va., 601, the court said:

"It will make no difference in this respect whether or not the arbitrator shall swear that the testimony improperly received by him in the absence of a party, or of both parties, had no influence upon his decision. He will not be allowed to determine upon this matter. *Walker v. Frobisher*, 6 Ves. Jr., 70; *Featherstone v. Cooper*, 9 Id., 67; *Dobson v. Groves*, 6 Q. B., 637; *Plew v. Middleton*, 6 Q. B., 845; *Harvey v. Shelton*, 7 Beavan, 459."

(e) The award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

Walker v. Frobisher, 6 Ves., 69.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Dobson v. Groves, 6 Q. B., 637.

Passmore v. Pettit, 4 Dall., 270.

Knowlton v. Mickles, 29 Barb., 465.

McFarland v. Mathis, 10 Ark., 560.

Lattin v. Gamble, 154 Mich., 177-181.

In *Walker v. Frobisher*, 6 Ves., 69, the court held an award void because an arbitrator had received *ex parte* evidence. The court in speaking of the arbitrator, said, "He is a most respectable man. But I cannot, from respect for any man, do that which I cannot reconcile to general principles."

Dobson v. Groves, 6 Q. B., 637, is a case where an arbitrator had taken evidence in regular course, as in the case at bar, and received an *ex parte* statement. "No imputation was cast upon the motives of the arbitrator." Lord Denman, C. J., in the opinion said:

"The arbitrator said that nothing which passed on that meeting would influence his decision; but I think that no information ought to be received at all under such circumstances, unless the arbitrator has an express power reserved for that purpose, or the parties agree that he shall exercise it."

In *Passmore v. Pettit*, 4 Dall., 270, the court said, p. 271:

"On the subject of the reference, all the testimony should be heard, all the documents should be seen, by both the parties, in the presence of the

referees." * * * "The referees and umpire are, undoubtedly *honest men*; but they have erred in judgment; and their errors cannot be sanctioned, by an affirmance of the report, which their errors alone may have produced."

In *McFarland v. Mathis*, 10 Ark., 560, the court in speaking of an arbitrator who had received *ex parte* testimony, said, p. 567:

"The courts have set aside awards on that account, *although the arbitrator made oath that such examination did not influence his judgment.*"

In *Lattin v. Gamble*, 154 Mich., 177, the court said, p. 181:

"We shall assume that in sending for the solicitor for complainant and in exhibiting to him the proposed finding, in listening to his criticisms thereon, and in later considering evidence not adduced before all of the arbitrators, the two arbitrators *were entirely innocent* of any wrong intention or of impropriety. We are obliged to say that those rules of conduct to the observance of which the profession is bound were violated when one of the solicitors, in the absence of the solicitor for the other party, submitted further argument, and when, without knowing that further conference of the arbitrators was impossible, he privately expressed, or intimated, his opinion to the arbitrator chosen by his client."

—o—

(f) The Water Company will not be heard to say that its conduct in presenting its books to the board of appraisers did not improperly influence them or produce harmful results.

Catlett v. Dougherty, 114 Ill., 568.

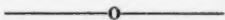
Ins. Co. v. Hegewald, 66 N. E., 902. (161 Ind., 631).

In *Catlett v. Dougherty*, 114 Ill., 568, the court in speaking of this point, said, p. 573:

“It is sufficient to authorize the enjoining of the suit at law and the setting aside of the award, that James M. Dougherty—one of the real parties in interest—made a statement to him, in the absence of his adverse party to the arbitration, evidently designed and having a tendency to improperly affect his decision as an arbitrator. *Courts will not enter upon an inquiry of how far such conduct may, in fact, have produced harmful results, but will, at the instance of the party intended to be thus injured, set aside the award.*”

In *Insurance Co. of North America v. Hegewald*, 66 N. E., 902, (161 Ind., 631), the court in speaking on this point, said, p. 908:

“A rule which seems to be reasonable, and one well settled by authorities, is that a party to an arbitration, who by his own acts either attempts to corrupt or improperly influence one or more of the arbitrators to make an award in his favor, cannot be heard to say that such act or acts on his part were ineffectual to accomplish the purpose designed.”



(g) An arbitrator who takes instructions from one side—as Mead did from the manager of the Water Company regarding the books—is in law acting corruptly.

Strong v. Strong, 9 Cush., 560.

Western Female Seminary v. Blair, 1 Disney, 370.

In *Strong v. Strong*, 9 Cush., 560, Cushing, J., said, p. 572:

“The doctrine in the case of *Walker v. Frobisher*, was afterwards affirmed by Lord Eldon himself

in *Featherstone v. Cooper*, 9 Ves., 67, in which case he says that arbitrators must understand 'that they are acting corruptly, acting as agents; and that their award ought to be set aside, where they take instructions or talk with one party in the absence of the other.' "

In *Western Female Seminary v. Blair*, 1 Disney, 370, the court said, pp. 379-380:

"When the testimony is once closed, neither party, in the absence of the other, or without the consent of the other, is permitted to be heard anew."
 * * * "So, in 9 Vesey, Jr., 68, *Featherstone v. Cooper*, it was held: 'Arbitrators must understand that they are acting corruptly whenever they take instructions, or talk with one party in the absence of the other.' "

IV.

THE SAID ENGINEERS IN ESTIMATING THE VALUATION OF THE WATERWORKS HAD NO RIGHT TO RECEIVE EX PARTE EVIDENCE. THE ARGUMENT THAT THE THREE ENGINEERS SELECTED TO VALUE THE WATERWORKS WERE MERE VALUERS OF PROPERTY, AND THEREFORE NOT BOUND BY ANY OF THE RULES RELATING TO ARBITRATIONS, AND AFTER HEARING THE EXAMINATION OF WITNESSES AND THE ARGUMENTS OF THE ATTORNEYS FOR THE RESPECTIVE PARTIES IN OPEN SESSION WERE AT LIBERTY TO SUBSEQUENTLY RECEIVE EX PARTE TESTIMONY AND TO HOLD SECRET COMMUNICATIONS WITH THE OFFICERS OF THE WATER COMPANY, IS UNSOUND IN LAW AND VIOLATIVE OF A SENSE OF FAIRNESS, EQUITY AND GOOD CONSCIENCE.

We must deal with this case not on *theory* but on the facts. These engineers, when they assembled in Omaha, *requested* information from the parties in interest as to the manner of procedure to be adopted. After the expression of views the engineers, sitting as a board, decided that they would take evidence in open *session*. As we have said *supra*, five volumes of evidence was taken exceeding two thousand pages, together with hundreds of maps, plans, and blue prints. The case was argued and submitted. *The engineers and all parties in interest were committed to this procedure.* What right had the engineers after a year and two months had gone by to hold a meeting in Cincinnati without notice to the city and there receive *ex parte* evidence? What right had the Water Company to ship its books to Cincinnati and present them to the board without notice to the city? What right had the board and manager of the Water Company, after holding a consultation over the letter of

protest sent by the city, to reach an understanding that the appraisers would receive the books of the Water Company as confidential information and to deny the city an opportunity to be present or to be heard, or to introduce counter evidence? Our insistence is that there is no reported case in judicial history that sanctions and approves this clandestine and secret procedure. The court of appeals disposed of the point without argument, but quote excerpts from two cases: *Railroad Company v. Moore*, 64 Pa., St. 79, and *Palmer v. Clark*, 106 Mass., 373. (rec. pp. 737-738.) Neither of said cases are in point on the facts. The *Pennsylvania* case is one where the railroad company was to take over the horses of an omnibus line at a price to be assessed by three persons, who met and consulted as to the value and made an award. The *Massachusetts* case is one under an agreement that "B" should fill a lot of land in a city "to be measured on the ground by the City Engineer whose measurements shall be conclusive upon the parties." In neither case was there any occasion to take testimony. In the *Pennsylvania* case the persons selected could value horses by the mere inspection. In the *Massachusetts* case the taking of evidence would have been impracticable and impossible. Neither case turned upon the point whether it was proper to receive *ex parte* evidence. The question which was decided in each case was whether the valuation affixed constituted an award. What was said by the court in both cases as quoted by the Circuit Court of Appeals, were but comments by the court *arguendo* noting that a distinction existed to some degree between appraisers and arbitrators. Neither case is an authority to meet the conditions existing in the case at bar.

(a) The general rule is that valuers of property, although called appraisers, or referees, or commissioners, in receiving evidence and in making awards, are governed by the law relating to arbitration.

Continental Ins. Co. v. Garrett, 125 Fed., 589.

Christianson, Norwich Ins. Co., 84 Minn., 526. (87 Am. St. Reps., 379).

Mason v. Fire Ins. Ass'n of Philadelphia, 122 N. W., 423. (S. Dak., 1909).

Hills v. Home Ins. Co., 129 Mass., 345.

Washburn v. White, 197 Mass., 540.

Insurance Co. v. Hegewald, 66 N. E. 302. (161 Ind., 631).

Manf. Builders Ins. Co. v. Mullen, 48 Neb., 620.

Sherman v. Cobb, 10 Atl., 591. (15 R. I., 570).

Lowe v. Brown, 22 Ohio St., 463.

Godfrey v. Knodle, 44 Ill., App., 638.

Stose v. Heissler, 120 Ill., 433.

Emery v. Owings, 7 Gill., 448.

Redner v. New York Fire Ins. Co., 99 N. W., 886. (92 Min., 306).

Earle v. Johnson, 84 N. W., 332.

Hart v. Kennedy, 47 N. J. Eq., 51.

All the water mains were under ground, their length, dimensions, cost of digging the trenches were matters which could not be determined by observation. The depth, cost and extent of the rip rap work on the river embankment, the cost of the excavation and walling up of the water basins and many other like matters could not be determined by observation. The hundreds of plans, maps and blue prints put in evidence by the Water Company were for the purpose of illustrating matters not subject to observation.

Mr. Fairfield, the manager of the Water Company,

testified that the purpose for which the books were shipped to Cincinnati was to assist the board in arriving at a valuation of the water works. (folio 122, p. 107).

Continental Ins. Co. v. Garrett, 125 Fed., 589, is a case of appraisers appointed to estimate the loss under an insurance policy of a building which had burned. From the nature of the case it was almost essential that the appraisers should seek evidence, as in the case at bar. The syllabi states the facts as follows:

“Where appraisers appointed to estimate a loss under an insurance policy on a brick building, the woodwork of which had been completely destroyed, and the walls partially broken down, failed to give notice to the parties of the time and place of the appraisal, so as to permit the production of evidence, the award was void.”

Lurton, Circuit Judge, said, p. 592-593:

“That notice shall be given to the parties of the time and place of the hearing is ordinarily required, from the commonest principles of justice. *Lutz v. Linthicum*, 8 Pet., 165, 8 L. Ed., 904; *Elmendorf vs. Harris*, 23 Wend., 628, 35 Am. Dec., 587; *Vessel Owners Co. v. Taylor*, 126 Ill., 250, 18 N. E., 663; *Warren v. Tinsley*, 53 Fed., 689, 3 C. C. A., 613.” * * * “In the present case the arbitrators were to ascertain and appraise the sound value of a brick dwelling which had been so completely destroyed by fire as that substantially nothing remained of the woodwork, inside or out. The walls themselves were in part fallen. Thus a mere examination of the premises could not, on the evidence in this record, have informed them as to the character of the finishing of the interior work, and its condition before the fire. The appraisers were experienced contracting builders, but, without some evidence, how was it possible for them to know the sound value or the loss and damage. Under such circumstances, appraisers should give notice to

both parties of the time and place of hearing, and require evidence in respect of facts which they could not otherwise know." * * * "*If the appraisers heard evidence as to the character and finish of the interior of this house without notice, they were guilty of misconduct.* On the other hand, if they undertook to appraise the loss and damage resulting to the assured without other information as to the character of the interior work than that to be derived from such a ruin as this was, they were equally neglectful of their duty, and exhibited an indifference to justice most culpable."

Christianson v. Norwich Union Etc. Ins. Soc., 84 Minn., 526, (87 Am. St. Reps., 379), is a case of appraisers under an insurance policy. It appears from the report of the case that the appraisers "*held various meetings for the purpose of hearing the testimony of witnesses offered by respective parties,*" but that two of the appraisers "*privately consulted witnesses concerning the quality and value of plaintiff's stock of goods, thereby materially influencing their action and decision.*" This was held misconduct and for which the appraisal was set aside as being void. The court said in the course of its opinion, p. 530:

"The board of referees provided for under the standard policy is a *quasi* court, subject to the principles governing common law arbitration. Such board should sit in a body, and receive evidence offered by the respective parties, submitting the same to the usual tests of cross-examination." * * * "But while a certain liberality is permissible in acquainting themselves with the circumstances surrounding the fire without the medium of witnesses, *such board is not selected for the purpose of seeking evidence secretly, and determining the amount of the loss by reason of such personal knowledge.*"

Mason v. Fire Ins. Ass'n of Philadelphia, 122 N. W.,

423, is a case where it was ruled that appraisers under an insurance policy are a *quasi* court and should proceed in a judicial manner to hear evidence, etc. The court in its opinion said, p. 426:

"It is true that in the articles of submission to the appraisers in this case it was not stipulated that notice should be given, or a hearing had, but clearly justice requires that appraisers so appointed shall fix the time for their meeting, of which the parties, respectively, should be notified, and that they should hear and consider such evidence as should be introduced by the respective parties on such a hearing." * * *

"The board of appraisers, including the umpire, constitutes a *quasi* court, governed by rules applicable to common law arbitrators, and should constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy, without regard to the manner in which the duty has been devolved upon them."

Hills v. Home Ins. Co., 129 Mass., 345, is a case where an award under an insurance policy was held to be void because the appraisers of the loss (called arbitrators in said case) received *ex parte* testimony. The court in that case said, p. 348:

"Corruption, partiality or misconduct on the part of the arbitrators is a sufficient objection to an award, independently of any question as to a formal revocation of their authority. The facts reported show that two of the arbitrators at the second hearing were not impartial men, but had heard the case upon *ex parte* testimony, and had committed themselves to a decision which was not satisfactory to the plaintiff upon the very question in dispute. And this new hearing was had, not only after those two arbitrators had so committed themselves, and prejudged the case, but without notice to the plaintiff. It is true that much will be presumed in favor of an impartial

and fair award, but the irregularity in this case takes it out of the general rule. *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20. *Strong v. Strong*, 9 Cush., 560."

Emery v. Owings, 7 Gill., 448, is a case of the appraisalment of the cost of the construction of a private road. The appraisers were guilty of an *ex parte* examination of books of account. The court held the award void and said:

"To hear the cause of a party in his absence, and without notice, would be bad enough in all conscience, but in his absence, in such a case, to decide his cause upon the declarations of his antagonists, made when he was absent, surely is without precedent. Such circumstances we cannot sanction."

Redner v. New York Fire Ins. Co., 92 Minn., 306, is a case of appraisers appointed under a fire insurance policy. The facts sufficiently appear from what the court said as follows:

"The facts alleged as a ground for setting the award aside are not simply that the arbitrators refused to receive material and pertinent evidence, but that they refused the plaintiff the privilege of appearing before them, and refused to hear any evidence whatever from the plaintiff, or the witnesses produced by him, or any testimony on his behalf. If such allegations of the complaint be true, the arbitrators acted arbitrarily, for the plaintiff was legally entitled to appear before them and be heard, and to introduce evidence as to the amount of his loss. A denial of such right made the award voidable. *Mosness v. Ins. Co.*, 50 Minn., 341, 52 N. W., 932; *Janney, Semple & Co. v. Goehringer*, 52 Minn., 428, 54 N. W., 481; *Levine v. Ins. Co.*, 66 Minn., 138, 68 N. W., 855; *Christianson v. Ins. Co.*, 84 Minn., 526, 88 N. W., 16, 87 Am. St. Rep., 379; *Produce Refrigerator Co. v. Ins. Co.*, (Minn.), 97 N. W., 875."

Earle v. Johnson, 84 N. W. 332 (81 Minn. 472) is a case of appraisers appointed under a lease. The court said, p. 333:

"A person acting in the capacity of the plaintiff as an appraiser under a lease, which requires a valuation to be fixed upon real property, is to all intents and purposes an arbitrator at common law. The proceeding is, in effect, a common law arbitration."

Hart v. Kennedy, 47 N. J. Eq. 51, is a case of an appraisement by three engineers where they refused to hear evidence tendered by one of the parties which the court held to be misconduct as appears from the following excerpts from the opinion:

"While these two suits were pending, the parties, in December, 1888, agreed to submit the matters in difference between them to the decision of three competent and impartial civil engineers, who understood the force, pressure, and effect of water,—one to be selected by the complainants, another by the defendant, and the third by the other two. The three so selected were to survey the ground, take levels, and determine—*First*, whether back-water on the lands of the complainants was caused by the dam of the defendant, and whether his dam caused water to overflow and damage the lands of the complainants; and, *second*, if so, how much the dam of the defendant should be reduced to prevent such back-water." * * * "The defendant by both his pleadings, alleges that the two arbitrators who made the award *refused* to hear any evidence on his part, pertinent and material to the matters in dispute. He says that when they first met to enter upon the discharge of their duties, as well as subsequently, he asked permission to lay such evidence before them, but that his request, each time it was made, was refused." * * * "Arbitrations are to be conducted upon the ordinary principles upon which other

judicial inquiries are conducted. The parties have a right to be heard by their proofs. Their right, in this respect, is a primary right. It is founded in natural justice. 'The principle,' said Chief Justice Spencer, in *Van Cortlandt v. Underhill*, 17 Johns, 405-411, 'is so fundamentally just that it requires no adjudged cases to support it.'"

The same rules apply to appraisers and arbitrators alike. In both classes of cases the receiving of *ex parte* evidence is forbidden, (see cases *supra*), and in both classes of cases all must join in the award unless it is otherwise provided.

Washburn v. White, 197 Mass., 540, is a case where the tenant under a clause in a lease had the privilege of electing to purchase at a price to be agreed upon by the award of three disinterested persons, one to be chosen by the lessor, one by the lessee and the third by the two so chosen. In that case, among other things it was ruled that an award of the appraisers to be valid *must be concurred in by all*.

Insurance Co. v. Hegewald, 66 N. E., 902, 161 Ind., 631, is a case of appraisers appointed under the provisions of an insurance policy. The court held that the appraisers were governed by the same rules as governed arbitrators, and among other things said:

"Appraisers in cases like the one at bar are considered as acting in a *quasi* judicial capacity, and in discharging their sworn duties they must act free from bias, partiality, or prejudice in favor of either of the parties. *Flatter v. McDermitt*, 25 Ind., 326; *Hickerson v. German, Etc. Ins. Co.*, 96 Tenn., 193, 33 S. W., 1041, 32 L. R. A. 172."

Manf. Builders Ins. Co. v. Mullen, 48 Neb., 620, is a case of appraisers appointed under an insurance policy. The court applied the doctrine of arbitration and held

the award void because signed by the umpire and by one arbitrator only.

Sherman v. Cobb, 15 R. I., 570, is a case of a renewal of a lease where the rental was to be appraised by three persons. The court applied the rule of arbitration and award and said:

“Under the covenant, however, there is no agreement that the award shall be binding unless it is unanimous, and therefore a mere majority award would not be binding under the covenant.”

Lowe v. Brown, 22 Ohio St., 463, is a case where a ground lease was to be “revalued” by three disinterested men; one appointed by each of the parties and these two to select the third. The court applied the rule relating to arbitration and held the appraisal void because only signed by two.

“The only power conferred upon the appraisers was expressly specified in the indenture. That instrument does not provide that the appraisement or report may be made by a majority of the appraisers. Nor can such authority be implied from its terms as may be done in cases where two, selected to make an appraisement, are empowered, in case of a disagreement, to call in a third.” * * * “The report, therefore, signed by two of the appraisers only, was of no validity, and was properly so regarded by the court below.”

Godfrey v. Knodle, 44 Ill. App., 638, is a case of the valuation of property under a lease. The court applied the rules relating to arbitration and held the valuation void because not concurred in by the three valuers.

Stose v. Heissler, 120 Ill., 433, is a case of appraisal under a lease. The court applied the same rule and said:

“The matter of fixing the rent was confided to the judgment, experience, and discretion of the persons nominated by the parties, and the one to be

selected by such nominees. The confidence of the parties was in the united judgment of the three, and they agreed to be bound by nothing less than their concurrent judgment."

The foregoing cases are sufficient to show that it is firmly established that appraisers or valuers of property are required to be straight forward in the conduct of their appraisalment; to hear evidence when tendered by the respective parties; are governed by the general rules that apply to arbitrations; that they act in a semi-judicial character; and that it is gross misconduct for them to receive *ex parte* evidence as was done by the appraisers in the case at bar.

The *ex parte* and secret manner of receiving and examining the books by the appraisers at Cincinnati in the presence of the manager of the Water Company, the subsequent private conference between the chairman of the appraisers and the treasurer of the Water Company in Chicago, can not be excused or justified on the ground that this was a *public appraisalment*. *If this were a public appraisalment why should it not have been conducted in a public manner? Is there any law or sense of justice that permits a public appraisalment to be conducted in a secret manner?* Can public appraisers receive secret evidence tendered by one party and refuse the adverse party an opportunity to explain or rebut such evidence? An appraisalment can not be said to be a public appraisalment except the public be interested. If the public is interested in the appraisalment they have a right to know what is going on. In the case at bar the city (the public) were precluded from knowing what was going on at Cincinnati and were excluded from the right to rebut the secret evidence tendered by the Water Company. This proceeding is inconsistent with the idea that this was a public appraisalment. Such proceeding is misconduct which invalidates any award, public or private, alike.

THE AWARD IS VOID BECAUSE THE APPRAISERS EXCEEDED THEIR AUTHORITY IN APPRAISING AND INCLUDING IN THE AWARD THE SUM OF \$562,712.45 FOR GOING VALUE.
(rec. p. 165.)

The appraisement is made under Section 14 of Ordinance 423, which reads:

“Sec. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; Provided, that nothing shall be paid for the unexpired franchise of said company.”

Said section does not provide for the appraisal of the “going value.” The right of the city to purchase did not accrue until the expiration of twenty (20) years from the construction of the works. This gave the water company the right to the rents, profits and revenues for the full period of twenty (20) years. This was adequate to give the company compensation for the venture. There is no reason under the circumstances why the water company should be paid for the works and in addition thereto to receive by way of a bonus \$562,712.45, under the name of “going value.” The city was not buying the franchise of the company, nor the good will of the company, nor the business of the company, but it was buying the *water works* and nothing more.

This court in *Knoxville v. Water Company*, 212 U. S. 1, expressed some doubt as to the propriety of including \$60,000 for going concern. What this court said in *Wilcox v. Consolidated Gas Co.*, 212 U. S., 19-52, re-

lating to "good will," seems equally appropriate to "going value" in the case at bar.

"We are also of opinion that it is not a case for a valuation of 'good will.' The master combined the franchise value with that of good will, and estimated the total value at \$20,000,000.

"The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand,' because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action."

VI.

THE AWARD INCLUDES PROPERTY THE CITY IS WITHOUT AUTHORITY TO PURCHASE, TO-WIT: THOSE PARTS WITHIN AND USED ONLY TO SUPPLY WATER TO FLORENCE, DUNDEE, EAST OMAHA AND SOUTH OMAHA.

The award includes the parts of the water works system used to supply water to the following out-laying municipalities: Florence, \$13,881.31; Dundee, \$19,398.83; East Omaha, \$21,568.50; South Omaha \$446,256.84. Going value in South Omaha, \$84,406.86. (See rec. pp. 164-165.) This action being one in equity to compel the city of Omaha to purchase the works of the company, including the parts in these out-laying municipalities, the relief should not be granted unless the right of the water company to compel the city to purchase the outlying properties is clearly established.

The charter of the city in force when the contract was made is found in Section 27, Laws of Nebraska 1879, page 99.

"27. To erect, construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and reg-

ulations concerning the use of water supplied by such water works, and to do all acts necessary for the construction, completion, management and control of the same * * * and the mayor and council of each city created or governed by said act shall have power to contract with and to procure individuals or incorporations to construct and maintain water works on such terms and under such regulations as may be agreed on."

To construct water works for whom? Manifestly for the city of Omaha, not for other cities.

The first part of the section is a grant of authority to the city to erect and construct water works within or without the corporate limits. The concluding part of the section relates to the right to contract for the supply of water. The right granted to the city to construct water works within or without the corporate limits of the city contemplates the right to go outside the corporate limits to obtain a *source of supply*, but the works to be constructed or contracted for are limited to a supply of water for the city of Omaha.

The city employed *J. D. Cook* as an expert engineer to report a plan for a supply of water and which report devised a plan for a supply for the city of Omaha. (rec. pp. 319-336.) Thereupon the city passed Ordinance 423, (rec. pp. 680-686) and amendatory Ordinance No. 430, (rec. pp. 686-688) which authorized a contract for the construction of "water works in the city of Omaha * * * for the purpose of *supplying said city* and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes." The election to purchase and the appraisalment of the value of the water works is under Section 14 of said ordinance 423, (rec. p. 686) and quoted in the preceding chapter of this brief. The contract for the construction of the water works is

to "erect, construct and maintain said water works in the city of Omaha and to *furnish the city of Omaha*, party of the first part, with water for fire protection and public use for the term of twenty-five (25) years" pursuant to the said ordinances Nos. 423-430. (rec. pp. 688-689.) The ordinance of the city electing to purchase (rec. p. 160) provides:

"And do elect and determine to purchase and acquire such water works plant by virtue of the rights inuring to said city through the contract between said city and the grantors of said water company and as authorized and provided by section 14 of the Ordinance No. 423."

So far we see that all of the provisions of the said charter, the ordinances, the election to purchase and the selection of appraisers is for the "purpose of ascertaining the appraised valuation of said water works plant as provided in Section 14 of Ordinance No. 423." (See section 2 of ordinance electing to purchase. p. 160.)

It appears by affirmative evidence that when Ordinance No. 423 was enacted and the water works constructed, Dundee, East Omaha and South Omaha were not in existence. South Omaha was first incorporated in 1886 and Dundee in 1894. East Omaha is but a voting precinct up to date. (rec. pp. 436-437.) The court of appeals in its opinion put stress upon a provision in an act of 1897, which contains the following:

"To appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, electric light plants or water works, including mains, pipe lines, and settling basins therefor, the right and power to appropriate private property for sewers, parks, parkways, boulevards, electric light plants and water works, to extend for a distance of ten miles from the corporate limits of the city; they

shall also have power to appropriate any water works system, plant or property already constructed, *to supply the city* and inhabitants thereof with water or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises to own and operate the same, if any."

It is a mistake to assume that because the city was given power to *appropriate* any water works system which might be wholly within or in part without the city, that said section was intended to give the city a right to own and operate water works for the purpose of supplying *outlying* cities with water. At the time when said act was passed the in-take of the water company was at the bank of the Missouri river at the northern limits of the town of Florence, a distance of some six miles or so from Omaha. The language of the section was drafted to be appropriate to the situation; that is to enable the city to appropriate the in-take and the settling basins which were without the limits of the city.

The first part of the statute we have just quoted *supra* including the "ten miles limit" applies to sewers, parks, parkways, boulevards and electric light plants, as well as to water works. Certainly no one would contend that the city of Omaha was given authority to construct, own, maintain and operate sewers and parks and boulevards, etc., within and *for the benefit* of the outlying municipalities, Florence, Dundee, East Omaha and South Omaha. The language goes no further than to give the city the power to acquire the in-take of the water com-

pany which may be without the city limits, as well as an out-let for its sewers which may be without the city limits, and likewise to go beyond the city limits to buy property for parks, boulevards, etc. But all the while the statute was only dealing with things and instrumentalities which were to be used as stated in the section "*for the use of the city.*" The court of appeals construed the section as giving the city power to acquire any of the properties or things mentioned for the use of *some other municipality.*

The act of 1905 creating the Water Board contains two sections pertinent to the question at hand. (Laws of Neb., 1905, pp. 172-5.):

"Section 7659. The Water Board shall have general charge, supervision, and control of all matters pertaining to the *water supply of such city for domestic, mechanical, public and fire purposes as hereinafter provided:* If such city, or any portion thereof, shall be supplied with water for domestic, mechanical, public or fire purposes by any individual, co-partnership, or corporation, then, and in such case, said board shall have the sole power and authority to *regulate and fix the water rates and fire hydrants rentals;* to provide for and order the extension of water mains; to determine the number and designate the location of all fire hydrants; to audit, pass upon, and pay or reject any and all bills for water or fire hydrants furnished such city; to make, modify, and terminate, on behalf of such city, all contracts for the supply of water to such city for domestic, public or fire purposes."

"Section 7661. The Water Board may contract *with any municipality* adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes; or *may contract,* to the same end, *with any person, co-partnership, or corporation, supplying any such adjacent municipality* with water for domestic,

public, or fire purposes, upon such terms and conditions as said water board may deem proper; provided, however, that *all water* so furnished shall be measured by *meter at the expense of such municipality, person, co-partnership, or corporation*, as the case may be; and that the rate per thousand gallons, fixed by said water board, shall not be less than the gross average income per thousand gallons for all water furnished such *metropolitan city* and its inhabitants by such municipal water plant; provided, further, that in computing the income of such water plant, each fire hydrant located within such metropolitan city shall be assumed to produce a reasonable revenue to be definitely fixed by said board."

The power to regulate water *rates* and hydrant *rentals* in the first section quoted is *limited to the city of Omaha*. The act only creates a water board in each city of the metropolitan class. (see sec. 7654 of said act.) Omaha being the only city of the metropolitan class, is the only city in the state that has a water board. The grant of power in Section 7661 is not to purchase, own and operate water works in Florence, Dundee, East Omaha and South Omaha, but only to *sell water* directly to said municipalities, or to any water company that shall supply said municipalities with water. The price to be charged for such supply of water, if taken by the municipality, is to be paid for by such city in gross by meter measurement. That is to say if the Omaha Water Company retains its ownership of its distribution system in Florence, Dundee, East Omaha and South Omaha, the water board of the city of Omaha may sell to the water company, water to be by it delivered to said municipalities. If said municipalities shall own their own water system within their own limits, the water board may sell water to the said municipalities. But the municipalities

in that event regulate their own distribution of water, their own rates, their own hydrant rentals.

What we point to is that there is no existing statute of the State of Nebraska authorizing the city of Omaha to purchase, own and operate a water works system within the out-lying municipalities for the purpose of supplying them with water. The purpose of the sections quoted *supra* was to preserve a method by which the water board might make contracts to supply outlying municipalities with water. What is sought in the case at bar is to *compel* the city of Omaha to purchase the water works in the several municipalities and consequently to compel the city of Omaha to operate said works in said municipalities. We might as well say with equal force that the city of Omaha is authorized to construct and operate the sewer system, or the park system, or the electric light system in these outlying towns. The statute gives no such grant of power to the city of Omaha and without it a court of equity can not confer it.

If the water works are taken over it must be by an issue of bonds by the city of Omaha and by a levy of taxes to pay the interest and principal thereof. Nowhere in the statute is there any authority given the city of Omaha *to issue bonds* or to *levy taxes* upon the property within its limits to *pay for the purchase and operation of water works in some other city and for the benefit of some other city*.

It is elementary law that a municipality acts under delegated power and can exercise only such rights and powers as are expressly conferred or necessarily implied from express grants; and all grants of power are to be strictly construed. *Citizens St. Ry. Co. v. Detroit Ry Co.*, 171 U. S., 48-53. *City of Fort Scott v. Eads*

Brokerage Co., 117 Fed., 51-54. *State v. Ireys*, 42 Neb., 189.

There are many cases in which it has been ruled that cities have no power to levy taxes for the purpose of maintaining or to own or construct water works for the benefit of adjoining municipalities. *Sutherland-Innes Co. v. Village of Evert*, 86 Fed., 597. *Ottawa v. Carey*, 108 U. S., 121. *Quincy v. City of Boston*, 148 Mass., 389. *Arnold v. Mayor of Pawtucket*, 21 R. I., 15. *City of Duluth v. Duluth Gas & Water Co.*, 45 Minn., 210. *Farwell v. City of Seattle*, 86 Pac., 217 (43 Wash. 141). *Town of Bristol v. Bristol & Warren Water Works*, 49 Atl., 974; 23 R. I., 274.

Where the power of one city to supply another city with water has been sustained there will be found express statutory authority to that end. *Town of West Hartford v. Board of Water Commissioners*, 68 Conn., 323. *City of Pittsburg v. Brace, et al.*, 158 Penn., 174.

The Omaha Water Company has at all times dealt with these outlying municipalities under an independent right and accepted from them charter or contract privileges. The predecessor of Omaha Water Company accepted a franchise from South Omaha, approved October 17, 1887, (rec. pp. 419-420) which ran for a period of 17 years, or to October 17, 1904. The election of the city of Omaha to purchase was dated February 24, 1903. In August, 1903, the water company accepted a new franchise from the City of South Omaha, running for a period of 10 years, (rec. p. 421) and which contains an obligation that the water company shall pay to South Omaha \$2,500 per annum "after the year 1903 and during the existence of this contract." A subsequent ordinance of South Omaha amended this franchise (rec. p. 422) to the effect that if the company should erect addi-

tional hydrants during 1903 and 20 additional hydrants during 1904, that the annuity should be reduced to an amount equal to \$60.00 for each of the hydrants in South Omaha. *Evidently the water company believed it had an independent right to contract with South Omaha and entered into said contracts notwithstanding the election of the City of Omaha to purchase the water works.*

The charter of the City of South Omaha, (Compiled Statutes of Nebraska 1909, p. 401, Chap. 13, Art. 2, 1470) gives the city authority as follows:

“To erect, construct, purchase, maintain, and operate subways or conduits, *water works*, gas works, and electric light plants, or necessary parts thereof within the corporate limits of the city; and they shall have *power to fix, charge and collect a rental* or compensation for the use of subways or conduits, and of water, gas, electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act, and the mayor and council of such city shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light or electric power to the public or private consumers within such city, and the rates, terms, and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract as provided in this act.”

It needs no comment to show that the provision of the charter of South Omaha is *inconsistent and directly in conflict* with the thought that Omaha may own and

control the water works in South Omaha, regulate rates, etc.

The city of Florence entered into independent contracts with the water company for supply of water. (rec. pp. 423, 426, 713, 714, 717, 718, 719, 720.) These contracts require the water company to extend mains and set fire hydrants whenever ordered to do so by the city council of the city of Florence; fixes the price of hydrant rentals, water for public schools, etc. (rec. pp. 426-427).

The contract with East Omaha, (rec. p. 428), provides in sub-division tenth, (rec. p. 431):

“In case of any purchase of the works of the second party in the city of Omaha by the said city, and the said property of the said first party shall not be included within the corporate limits of said city of Omaha, then and in such case the first party shall have the option to purchase the mains and pipes laid down within the said property; and if it does not choose to purchase the same the second party may convey the same to the city of Omaha subject, however, to the provisions of this instrument.”

Said quotation from the contract with East Omaha is inconsistent with the thought that the election to purchase by the city of Omaha would include the works in East Omaha. Manifestly the Water Company did not construe a purchase and appraisalment under Section 14 of Ordinance 423 would include the outlying properties.

A similar situation existed in *National Water Works Co., v. Kansas City*, 65 Fed., 691. The water works plant was used to supply water to Kansas City, Missouri, and to Kansas City, Kansas. The source of supply was in Kansas, yet the court held that while Kansas City, Mo., had a right to purchase the intake of the source of supply, yet it was not required to purchase the distribution system in Kansas City, Kansas. For reference to a discussion of the situation in that case, see pages 698-9 of the case, *supra*.

VII.

EQUITABLE CONSIDERATIONS WHY A DECREE OF SPECIFIC PERFORMANCE SHOULD NOT BE ENTERED AS PRAYED.

Aside from the questions heretofore argued which we believe render the award void, there are equitable considerations why a decree for specific performance as prayed, should not be ordered.

First. The relief prayed for is that the city shall be required to take over the water works system and pay therefor in money the sum of \$6,263,295.49. The award sets forth in the last paragraph thereof that a certain inventory included in the said award "should be revised and corrected in accordance with the material on hand at the time of transfer and the valuation herein contained should be modified in accordance with the materials on hand at that time." (rec. p. 165.) Said inventory is not in the record, it has not been revised and corrected, the court can not know definitely what the amount of the appraisement should be, or the correct amount of money which the city should be required to pay. This suit was instituted on the identical day of the filing of the award, which did not permit of any such correction and revision. The amount of the award is therefore left indefinite and uncertain.

Second. The deed tendered (rec. p. 723) is made *subject to the contract obligations* of the Omaha Water Company to the municipalities of *South Omaha, Florence, Dundee, Benson and East Omaha*, (folio 841) and is without covenants of warranty. It appears in the record that the water works are subject to two mortgages: one for \$1,500,000, dated July 23, 1896, maturing 1916, and another under the same date for \$6,000,000, maturing 1946. (rec. pp. 197-215.) Said mortgages cover the

property in the outlying municipalities and, in aggregate amount, exceed the award. The trustees under the respective mortgages are not parties to the suit, therefore the rights of the bondholders can not be adjusted in this proceeding, because their rights in the water works property in Florence, Dundee, East Omaha and South Omaha cannot be cut off nor determined. The rights of the bondholders under the said mortgages in the outlying properties *was not subject to the election of the city of Omaha to purchase.*

The demand made upon the city when the deed was tendered was for the payment *instantly* to the water company of the sum of \$6,263,295.49. (rec. pp. 34-35.) If the city had complied with the demand and accepted the deed tendered, or if the court should enter a decree as prayed, the city would pay to the water company \$6,263,295.49 and would obtain nothing therefor, but an *equity* in the property of *no value*, because the mortgage obligation exceeds the purchase price. It is a rule of equity that a decree of specific performance will not be entered where the purchaser would only obtain an equitable title. *Wesley v. Eells*, 177 U. S., 37. *City of Tiffin v. Shawhan*, 43 Ohio St., 178. *Guild v. Atchison, Topeka & Santa Fe Ry.*, 57 Kan., 70.

Third. A court of equity will not decree a specific performance except where the right is clear. Owing to the fact that the award was only signed by two of the appraisers, and owing to the misconduct of the appraisers in receiving *ex parte* evidence, and owing to the fact that the award includes outside properties, etc., it is apparent that the minds of the parties were not agreed, either as to the manner of the appraisal, or as to what was to be included in the appraisal under the contract. The complainant has not proven such a clear right as

entitles it to specific performance under the circumstances stated. *Willard v. Tayloe*, 8 Wall., 557-565; *Hennessy v. Woolworth*, 128 U. S., 438-442; *McCabe v. Matthews*, 155 U. S., 550-553; *Hildreth v. Duff*, 148 Fed., 676.

Although the proof might come far short of showing sufficient to authorize the court to set aside the award, nevertheless, it may be sufficient for a court of equity to refuse specific performance. *Shoop v. Burnside*, 78 Kan., 871-876. *Banaghan v. Malaney*, 200 Mass., 46-49.

Fourth. The election of the city of Omaha to purchase was made February 24, 1903. The case was submitted to the appraisers December 31, 1904, the award was not handed down until July 7, 1906. These delays of themselves would be sufficient to deny the decree of specific performance. *C. M. & St. P. Ry. Co. v. Stewart*, 19 Fed., 5. (a delay of six months.) *Gotthelf v. Stranahan*, 138 N. Y., 345. (a delay of three months.) *Gish's Executors v. Jamison*, 31 S. E., 521, (96 Va., 312.) Great changes may have taken place in the value of the property in the interim between the election to purchase and the coming down of the award (More than three years.) Besides the award fixes the value of the property as of the date of the award, while the law requires the valuation to be fixed as of the date of the election to purchase. *Bristol v. Bristol*, 25 R. I., 189. *Cherryvale Water Co. v. Cherryvale*, 65 Kans., 219. *Caldwell v. Frazier*, 65 Kans., 24. *Rockport Water Co. v. Rockport* 37 N. E., 168, 161 Mass., 279. *C. M. & St. P. Ry Co. v. Stewart*, 19 Fed., 5.

Fifth. It is provided in the act of 1905 (Laws of Nebraska, 1905, p. 173):

"Said water board shall have the sole power and authority * * * including * * * the acceptance or rejection of any award resulting from any such appraisement * * * provid-

ed, that no acceptance of any such appraisement shall be binding upon such city unless bonds are voted for the acquisition of such water plant under such appraisement."

The water board by a series of preambles and resolution did reject said award as being illegal, null and void. (rec. pp. 166-169).

Sixth. We are constrained to insist that by reason of the considerations in this brief presented, the Omaha Water Company is not entitled to a decree of specific performance and that the order and judgment in the Circuit Court of Appeals should be reversed and the order and judgment of the Circuit Court dismissing the bill should be affirmed. It would be agreeable to the city of Omaha if this court be so advised to enter its order and judgment setting aside the award and remanding the case to the Circuit Court under proper directions to proceed in a judicial manner to ascertain the value of the water works as was done in the case of *Castle Creek Water Co. v. City of Aspen*, 146 Fed., 8.

JOHN LEE WEBSTER.

CARL C. WRIGHT.

HARRY E. BURNAM.

Solicitors for City of Omaha.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 159.

Office Supreme Court U. S.

FILED

APR 7 1910

JAMES H. MCKENNEY,

Clerk

THE CITY OF OMAHA,

Petitioner,

vs.

THE OMAHA WATER COMPANY,

Respondent.

BRIEF OF RESPONDENT.

HOWARD MANSFIELD,

R. S. HALL,

HERBERT C. LAKIN,

Of Counsel for Respondent.

HOWARD MANSFIELD,

Solicitor for Respondent.



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THE CITY OF OMAHA,
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No. 159.

BRIEF OF RESPONDENT.

Statement.

This case comes before this Court by writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, granted June 1, 1908, on the petition of the City of Omaha, for the review of the decision of that Court, filed April 7, 1908, reversing a decree of the Circuit Court of the United States for the District of Nebraska, entered on June 29, 1907, which dismissed the bill of complaint of The Omaha Water Company in a suit against the City of Omaha to compel specific performance of the city's agreement to buy the system of water works operated by the water company (Record, pp. 187, 746, 747).

By the decision of the Circuit Court of Appeals the agreement of purchase was held to be binding upon the city, the appraisalment instituted by the city for the purpose of ascertaining the purchase price was held to be valid, and the cause was remanded with directions to proceed to decree in accordance with the views expressed in the opinion.

The decision is reported in 162 Fed., 225, and the opinion appears in the Record at p. 733.

The specific assignments of error stated in the Petition for Writ of Certiorari are as follows:

"1. That the Court erred in holding that the terms of the contract reserving to the City of Omaha the election to purchase the water works authorized a valuation of the water works by a majority of the three appraisers, whereas the Court should have held that by the terms of the contract the valuation of the water works could only be ascertained by the concurrence of the three appraisers.

2. The Court erred in holding that the valuation of the water works, under the election clause in the contract, was in the nature of a public appraisalment in which the appraisers were acting for the public as distinct from an appraisalment under a contract between individuals or private corporations, whereas the Court should have held that the said contract between the City of Omaha and the Water Company as between the contracting parties, was governed by the same rules, principles and obligations that govern contracts between individuals or private corporations, as the same Court had previously held in the suit of the *Omaha Water Company v. The City of Omaha*, 147 Fed., 1.

3. That the Court erred in holding that the secret and *ex parte* receiving in evidence and

examination of the books of the Omaha Water Company at Cincinnati, February 7, 1906, was not an improper procedure and was justified by precedent, whereas the said Court should have held that the same was misconduct on the part of the Omaha Water Company and on the part of the board of appraisers, and that said misconduct rendered the award void.

4. The Court erred in holding that the election to purchase by the City of Omaha included all the properties of the Omaha Water Works system, including the parts lying in the said outlying municipalities, and used only for the supplying of the said outlying municipalities with water, whereas the Court should have held that the said election to purchase, by its terms, was limited and confined to that part of the water works constructed under the contract with the City of Omaha, and used only for the purpose of supplying the City of Omaha with water for fire protection, public and domestic uses, and was so limited by Section 14 of the contract between the City of Omaha and the Water Company, said Section being the only authority under which the election to purchase existed.

5. That said Court erred in holding that the City of Omaha had corporate authority to purchase that part of the water works system extended into and used only for supplying the municipalities of East Omaha, South Omaha and Dundee with water, whereas the Court should have held that the City of Omaha was possessed of municipal authority to purchase only that part of the water works used for the supplying of the City of Omaha with water for fire protection, and public and domestic use, and such as was necessarily appurtenant thereto (Petition, pp. 8 and 9).

While the answer in this case freely characterizes as "illegal and wrongful" and "grossly wrongful and irregular" on the part of the two appraisers, Mead and Benzenberg, procedure in which the appraiser Alvord joined equally with the others, and repeatedly refers to the estimate of value as "fraudulent and void" (Record, pp. 26, 27, 28, 29, 30), and the brief of counsel for the city echoes these charges with talk of "a moral principle" involved (Brief, p. 28), there is not a particle of proof in the case to sustain such charges, nor was any supporting proof even offered. From the organization of the board to the signing of the report, Mr. Alvord was present and took part in everything that was done by the appraisers, and was in a position to put counsel for the city in complete possession of every fact and circumstance of the appraisal; yet he was not introduced as a witness for the city. Nor was there any pretense of showing by any evidence whatever that the estimate of value reported by the board is in any degree excessive or unfair to the city.

The continued averments in the answer that the two appraisers Mead and Benzenberg, "misconceiving their duties in the premises", and "in violation of their duties", and "in fraud of the rights of the defendant", adopted improper methods of procedure in determining the value of the water works, are not only absolutely without foundation in fact, but imply that throughout the proceedings of the board the appraiser selected by the city was overruled by the other appraisers, a wanton insult to all three appraisers, which is equally baseless in fact and without a shred of justification.

Every reflection upon the character and conduct of the appraisers is swept away by the Circuit Court of Appeals, which unhesitatingly declares that "there is no ground for questioning their entire honesty and sincerity" (162 Fed., 232).

Facts.

Origin of the Contract.

The contract of purchase was an incidental part of a contract on the part of the city with a predecessor of the water company for the construction and maintenance of a system of water works.

In 1879 the Nebraska legislature had passed an act giving the mayor and council of any city of the first class, of which class Omaha was then the only city in the State, power "to erect, construct and maintain water works, either within or without the corporate limits of the city . . . and to do all acts necessary for the construction, completion, management and control of the same . . . and to contract with and procure individuals or incorporations to construct and maintain water works on such terms and under such regulations as may be agreed upon." (Record, p. 371.)

In 1880 the City of Omaha, a community of some 30,000 inhabitants, employed an engineer named Cook to draw up a plan by which the city should have a system of water works which should serve both public and private purposes (Record, p. 319).

Upon the coming in of Cook's report, the city passed an ordinance (Ordinance 423) for the purpose of procuring the erection and maintenance by private interests of the system recommended.

This ordinance, which was enacted June 11, 1880, (Record, pp. 680-686), provided that any person, company, corporation or association who should erect, construct and maintain water works under Cook's plan "within and adjacent to the City of Omaha", for the purpose of supplying the city and its inhabitants with water for public and private purposes, should have the right to lay its pipes in the streets and maintain its system in the community, "during the time such person, company, corporation or association, or their assigns, shall maintain and operate any such water works." (Record, p. 680.)

Two sections of this ordinance are specially relevant to the determination of the questions now under review. The first of these is Section 11, (Record, p. 684):

"In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance, to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident), all rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in section 14 of this ordinance; Provided, that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

The other is Section 14, (Record, p. 686):

“The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; Provided, that nothing shall be paid for the unexpired franchise of said company.”

As a result of the advertising for bids, provided for in section 12 of the ordinance, the city entered into a contract with one Locke, who assigned his contract to the City Water Works Company of Omaha, which completed the system. The system was accepted by the city on September 4, 1883, by Ordinance No. 618 (Record, p. 339).

Growth of the System.

As Cook's report indicated, the system, including the pumping station, was originally located within the city limits. The ordinance compelled the use of the Missouri River water and a system of settling reservoirs, in order to clarify the water (Record, Sec. 2, p. 680). As directed in the report, the pumping station and settling basins were located at the foot of Burt and Izzard Streets, being in the general neighborhood of the Omaha Smelting Works. The original contract provided for only 250 hydrants (Record, p. 682). In 1904 there were 1,884 hydrants (Record, p. 442). In 1885, about two years after the plant was completed, the daily consumption of water was three and a half million gallons (Record, p. 118). In

1904, it was sixteen million gallons or more (Record, p. 117). Without counting certain service mains, the total mileage of pipe of the system of the company was, in 1904, about 220 miles, of which 182 miles were in the City of Omaha, and 31 miles in the City of South Omaha, (Record, p. 437 and ff).

As early as 1887, it became manifest to the American Water Works Company of Illinois, which had meanwhile acquired the water works, that the Burt Street pumping and settling station was inadequate. The company, after careful inquiry, discovered in the City of Florence, some six or seven miles north of the Burt Street Station, and on the Missouri River, the one place within many miles where rock bottom could be reached within a measurable distance of the surface of the river. On this new location, the company proceeded to erect an extensive pumping station, including settling basins as well as intakes. Not the least important feature of this work was the construction of what is technically known as rip rap, in order to protect the company's property from invasion by the river and at the same time to prevent the river from running off into Iowa, (Record, pp. 542-4, 565-570, 576-594, 594-625, 625-636, 641-657).

Growth of the Community.

Omaha is situated on a series of bluffs, bounded on the east by the Missouri River. Within less than three miles back from the river the bluffs develop into high hills. The result has been that Omaha has grown north and south along the river much more extensively than westward from the river. The community has entirely outgrown the

mere geographical limits of the city, so that there is now a continuous community more than eight miles long and, for the most part, much less than three miles wide, beginning at the company's pumping stations in Florence on the north and extending down through Omaha and South Omaha on the south (Record, pp. 572-3). The City of Omaha in 1904 had a population of 125,000 (Record, p. 454). Florence was still a small community, but south of the City of Omaha, and separated from it by a mere imaginary line, was the City of South Omaha, which had in 1903 a population of 31,000 (Record, p. 436). On the bottom lands to the eastward of the original limits of Omaha is the community, actually a part of Omaha, but separately designated as East Omaha, while west of Omaha and on the hills is another small community, called Dundee. The situation suggests the ultimate consolidation of these separate municipalities, and there is already on the statute books of Nebraska a law providing for the annexation of South Omaha to Omaha (Laws of 1905, Ch. 12a, Sec. 2).

South Omaha has been chiefly built up by packing industries organized by Omaha capital. It was settled about 1884, and was incorporated as a city in October, 1886 (Record, pp. 117-19, 123, 436, 528). So far as appearance goes, the City of South Omaha is not in the least separated from the City of Omaha. The streets of one community run into the streets of the other community, and there is no dividing line at the boundary. The street-car systems run from Omaha to South Omaha and *vice versa*. In the same way, the company's water system has no dividing line at the boundary between the two cities. So far is

this true that the first extension which the company made into South Omaha territory was actually ordered by the city council of the City of Omaha (Record, pp. 118, 529-530).

One reason why the company made extensions into South Omaha was because the packing houses, using large quantities of water, had been unable to obtain an adequate supply on their own account (Record, pp. 118, 124). It is undeniable that South Omaha and Florence and East Omaha and Dundee are all absolutely dependent on the Missouri River for their water. Dundee could not get its supply from the river without extending its system through Omaha, which would be too expensive for a small community; South Omaha could not safely take its water from the river south of Omaha for fear of contamination. Therefore, so far as the public benefit is concerned, the entire neighborhood, including all the municipalities, must depend on the same source of supply and be furnished from the same system.

Extension of the Company's System.

About the time the company had determined to build a new pumping station and reservoirs at Florence, Florence was a city, but nevertheless a small community.

The relations of the company to the City of Florence were early the subject of negotiation, which resulted in a contract by which that city closed certain streets, in order to enable the reservoirs to occupy the requisite space, agreed to protect the company's reservoirs and plant from trespassers and from damages and to furnish police therefor, and gave the company certain railroad trackage facilities, in order that its coal and

supplies might be unloaded at the company's doors, and furthermore gave to the company the right to lay through the streets of Florence its huge mains which were to supply Omaha and South Omaha. In return for this the company agreed to supply fire protection through hydrants, and water for general purposes of the community, at the rates in force in Omaha, for fourteen years. This contract went into effect in September, 1887, and was supplemented by ordinances passed in August, 1889 (Record, pp. 719, 714, 423, 717, 720, 718, 713).

The Florence contract was renewed for twenty-five years on November 14, 1903. An important feature of the original contract and of this renewal contract was that the rates to be charged for hydrant rental and also to private consumers were to be identical with those charged in Omaha (Record, pp. 426-7).

By Ordinance No. 29, passed October 17, 1887, the City of South Omaha made a contract with the American Water Works Company for a supply for the regular municipal and private purposes (Record, pp. 236, 420). The contract gave an extensive franchise to the company for seventeen years, expiring in 1904 (Record, p. 420), but a condition of the franchise was that South Omaha and its inhabitants should get their water supply on the same terms as the company's contract with Omaha provided. This franchise was renewed in the shape of a contract, Ordinance No. 1154 (Record, p. 421), as amended by Ordinance No. 1181 (Record, p. 422). The renewal period was for ten years from 1904.

Both the Florence and the South Omaha contracts will, of course, inure to the benefit of the

City of Omaha on the completion of its purchase of the water works system.

On September 7, 1889, the local authorities of Dundee passed a resolution authorizing the company to extend its mains into that village (Record, p. 433). Afterwards, on December 22, 1900, it made a contract for fire protection through six hydrants (Record, p. 485).

A year later, the East Omaha Land Company, a private corporation, operating on land which was supposed to be a part of Omaha, but as to a small part of which there was a dispute as to whether, owing to a change in the direction of the Missouri River, it was in Iowa or Nebraska, made a contract with the company for fire hydrants and a general water supply. This contract in return had for its conditions the same provisions as to rates that were in the contract with Omaha (Record, p. 428).

Internal Affairs of the Company.

The original contract made by the city was with Locke individually, but before 1883 he had assigned to the City Water Works Company, and this assignment was expressly agreed to by the city (Record, p. 338). In order to raise a part of the funds necessary to construct the system the City Water Works Company mortgaged its property and issued \$400,000 of bonds (Record, p. 205).

As the community grew, the City Water Works Company assigned its contract and transferred its property to the American Water Works Company of Illinois (Record, pp. 666, 690). This took place on July 1, 1887, and the assignment was expressly

ratified by the city on December 20, 1887. In March, 1891, the Illinois Company transferred its contract and property to the American Water Works Company of New Jersey (Record, pp. 670-673). Meantime, and on July 1, 1887, and January 16, 1889, the Illinois Company had mortgaged its property to the Farmers' Loan & Trust Company (Record, p. 261). The original mortgage expressly included the contract and all the company's property in Nebraska. It was for \$4,000,000, but sufficient of the bonds were reserved to take up the \$400,000 of bonds still outstanding which had been issued by the City Water Works Company. The later mortgage was supplemental to the original mortgage.

The next important event was the foreclosure suit by the Farmers' Loan & Trust Company, trustee of the mortgages, which resulted in a sale of the property on July 16, 1896, and its purchase by the trustee, acting for bondholders requesting the purchase. The important feature of the master's deed bearing that date is that it includes specifically, not only all the real property (except such, if any, as was situated in Iowa in connection with the East Omaha enterprise), but also all the personal property, and especially all the right, title and interest which had at any time theretofore been vested in, or held or enjoyed by, the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them, under the ordinances of Omaha, South Omaha and Florence, and under the contract with Locke, "or in any other wise acquired" (Record, pp. 235-6). All the parts of the foreclosure record which are essential to show the devolution of the company's title form a part of the

record in this case. They can be found at pages 260, 305, 316, 319, 337, 338, 339, 341, 362, 363, 364 and 232.

From the foreclosure record it appears that the appraisers appointed by the Court to value the property for sale, fixed, in 1894, a gross value, for the whole system and the contract, of \$5,500,000 (Record, pp. 349-350). The property was bought in by the trust company for four million nine thousand five hundred dollars, subject to the underlying mortgage of \$400,000, making the total cost, apart from legal expenses, \$4,409,500 (Record, pp. 342-6).

The Farmers' Loan & Trust Company conveyed the property to The Omaha Water Company, respondent herein, a new corporation formed by a bondholders' committee. The title passed July 23, 1896 (Record, p. 191).

The Omaha Water Company mortgaged the property, franchises and contract by two mortgages, one known as the prior lien mortgage, and one known as the consolidated mortgage. The prior lien mortgage, due 1916, secured bonds to the amount of not more than \$1,500,000, of which bonds to the amount of \$440,000 were reserved to take up the old City Water Works bonds. All the bonds issued under the prior lien mortgage are redeemable at any time at the option of the company at the price of 105 (Record, p. 201). The consolidated mortgage, due 1946 (Record, p. 217), secured bonds to the amount of not more than \$6,000,000, including bonds to the amount of \$3,600,000 issued toward paying in part for the property, \$650,000 for subsequent additions; the remaining bonds to the amount of \$1,750,000 being issuable only to take up the issue of prior lien bonds. The

total possible bonded indebtedness of the company, including the old City Water Works bonds, the prior lien mortgage bonds and the consolidated mortgage bonds, was, therefore, limited to six million dollars. The consolidated mortgage bonds are redeemable at any time at 105 at the option of the company (Record, pp. 218, 222).

The Forfeiture Suit.

On July 13 1896, a few days before the execution of the master's deed to the Farmers' Loan & Trust Company, the City of Omaha began a suit to compel a forfeiture of the contract under Section 11 of Ordinance 423, above quoted, and to procure the acquisition by the city of the property under that forfeiture clause. The bill of complaint in that suit was drawn with the greatest care and attention to every detail (Record, pp. 663-680). The Omaha Water Company was made a party on March 22, 1897 (Record, p. 368), and joined issue (Record, p. 700).

The issues raised by the bill in the forfeiture suit were, briefly, that the Illinois Company had mortgaged the water works without the consent of the city and had suffered the works to pass out of its possession, and had failed to keep the plant in good order, and to furnish suitable or adequate service, and had therefore forfeited all its contract rights; and that the city had the right to the entire water works system, both within and without the City of Omaha, and all the contract rights connected therewith.

The verified bill of complaint alleged that all the tangible property described in the mortgages under the foreclosure was "absolutely essential

to the operation of the said water works and to the performance of its public duty so as aforesaid then lying and being on said American Water Works Company, and that without the same and every part thereof, the said American Water Works Company could not perform its obligations nor fulfill its said contract." (Record, p. 669.)

The prayer of the bill contains this language (Record, p. 679) :

"And your orator further prays that it may be adjudged, decreed and determined that your orator has a right to take the immediate possession of all the tangible property of the water works plant of every kind and nature, including all of the property hereinbefore more particularly described in said decree of foreclosure."

One interesting element in this suit is the city's allegation that the plant, property, contract and franchise of the company were then worth more than \$7,500,000 (Record, p. 675). This allegation in the bill is made without any qualification as to information and belief. It is made as a statement of fact. The bill subsequently made certain allegations as to the extent of the company's revenues, those allegations being made on information and belief.

The Bond Vote of 1900.

There was some reason to dispute whether the twenty years at the end of which the city could exercise its option to purchase the water works, dated from the completion of the works or the making of the contract. If it dated from the making of the contract, the twenty-year limitation

would expire June 11, 1900, otherwise it would expire September 4, 1903. With a view to a purchase, proceedings were had in March, 1900, by which the citizens of Omaha voted an issue of \$3,000,000 of city bonds for "the purpose of appropriating or purchasing water works." The record herein shows these proceedings in full. The important fact in this litigation is that the bonds were voted for such purchase (Record, pp. 172-183).

Legislation of 1903.

Nothing further was done toward a purchase of the company's water works during the period between 1900 and 1903. In 1903 the State of Nebraska, at the instance of the City of Omaha, or some of its citizens, passed an act, general in form, as referring to metropolitan cities, but specific in effect, because the only metropolitan city in Nebraska was the City of Omaha, the title of which provided for the procedure by the mayor and council in the acquisition of a municipal water plant, and for the creation of a water board, and amended certain sections of the charter of metropolitan cities. In general, it provided (disregarding the fictitious reference to cities of the metropolitan class) that inasmuch as the City of Omaha had voted bonds for the purchase of a water plant, the mayor and council should, within thirty days after the act went into effect, declare by ordinance that it was necessary and expedient for the city to construct or purchase a system of water works, and should, beginning with the first meeting of the council after the approval of said ordinance, proceed to take the necessary steps to acquire such water plant, either under the powers granted by the charter of such city or by virtue of any rights

inuring to such city through contract or otherwise (Laws of 1903, Chapter 12, Sections 1 and 3).

On February 24, 1903, the city council, acting in conjunction with the water board, as prescribed in this act of 1903, passed its Ordinance No. 5162, approved by the Mayor March 2, 1903, reciting the act of the legislature and ordaining that, in pursuance of that act, the mayor and council declare "that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, and do elect and determine to purchase and acquire such water works plant by virtue of the rights inuring to said city through the contract between said city and the grantors of said water company, and as authorized and provided by Section 14 of the Ordinance No. 423" (Record, p. 159).

Thereafter, the city council selected, as one of the appraisers, for the purpose of ascertaining the valuation of said water works plant, John W. Alvord, of Chicago, an engineer of high standing and a specialist as a sanitary engineer (Record, pp. 42, 44, 56); and the water company selected, as the second appraiser for such purpose, George H. Benzenberg, of Milwaukee, holding also a prominent position in Cincinnati, an engineer in the front ranks of municipal engineers, and later president of the American Society of Civil Engineers (Record, pp. 41, 43, 51, 58-9, 64, 67); and these two appraisers, in pursuance of Section 14 of Ordinance 423, met in Chicago on June 18, 1903, and selected, as the third appraiser, Daniel W. Mead, of Chicago, an eminent specialist in regard to water works, and professor of engineer-

ing in the University of Wisconsin (Record, pp. 41, 43, 52, 58, 60, 64, 66, 14, 25, 161).

The First Part of the Appraisal.

The three appraisers met and organized in the office of the water board in the City of Omaha on July 20, 1903, Mr. Mead being appointed chairman and Mr. Alvord secretary. The meeting was public and was attended by various representatives of both the city and the company.

Evidence of the course of procedure on the appraisal appears in the record herein, as follows:

(A) *For the Company*—R. S. Hall, pp. 141-148; and Francis H. Marshall, pp. 128-129.

(B) *For the City*—Isaac E. Congdon, pp. 133-141 and pp. 449-473; George W. Craig, pp. 148-156, and pp. 441-443; James E. Boyd, pp. 473-485; C. C. Wright, pp. 487-498.

(C) *For the Appraisers*—Their report, pp. 159 and ff.

While the report of the appraisers is not testimony, its correctness is not assailed, and it may be read first as showing the unadorned facts of the course of the appraisal. It appears from the report:

“Said board, so organized, thereupon received such testimony, plans, blue prints, inventories and other matters pertaining to the property of the Omaha Water Company, and to the value thereof, as were submitted, by various parties interested, for the purpose of fixing and determining the value of such water works.

A large number of meetings were thereafter held by said board, during which time many hundreds of plans and blue prints, and several hundred pages of inventory were submitted by said Omaha Water Company and by the City of Omaha. Many days were occupied in the receipt of a large amount of evidence, all taken under oath and covering about two thousand pages of typewritten matter.

The sessions of the board for the receipt of such evidence were concluded on December 31st, 1904, the board of appraisers in the meanwhile, by numerous visits to all of the several parts of the water works plant, and by various excavations and examinations, having thoroughly familiarized itself with the several constituent parts of said plant, and with its various appurtenances, and as to the physical condition of the same.

Upon the conclusion of the hearings, the board proceeded to tabulate the evidence, and to appraise the property considered, until on the 8th day of July, 1905, when the board was enjoined by the Circuit Court of the United States of the District of Nebraska from completing said appraisalment" (Record, p. 161).

At the outset, Mr. C. C. Wright, then City Attorney, submitted in writing an outline of the plan of procedure suggested on behalf of the city. This document drew attention to the fact that the company owned and operated a system of water works by which it was supplying with water not only the City of Omaha, but also South Omaha, Dundee, Florence and East Omaha, and suggested that the appraisalment should be in detail, so far as practicable, giving the values of the different items of tangible property owned by said company under proper classification; also a separate valuation

upon its value as a going concern, if any should be determined, and also that there be a separate valuation upon that part of the system claimed to be strictly appurtenant to Omaha, and of the properties located outside the city, and, if the company desired, in addition, a single valuation of the system as a whole.

On the subject of procedure, it said:

"4. As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. *As to the method of arriving at the amount and condition of the property of the Water Company, the City of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter.* It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, to whose judgment the question of value must be submitted upon the examination of the property" (Record, p. 144).

In this view of the functions and powers of the appraisers, the counsel for the Water Company agreed.

The appraisers unanimously permitted the company to make its own inventory and to have as much time as was necessary for that purpose. As the record shows, the company had inherited no previous inventory, and difficulty was had in getting a suitable man to make an inventory, and it took more time than was expected to get possession of the details. It is not denied that the inventory, when finished, gave a complete and accurate statement of the property owned by the company.

The inventory consisted of a thousand or more plats, diagrams, schedules and descriptive matter (Record, p. 147). By arrangement with the City Attorney, copies of all these were submitted to the city, and opportunity was given the representatives of the city to verify the facts. In cases where verification proved to be impossible, the men who were familiar with the items were produced before the appraisers, and gave testimony in accordance with such arrangement. The record of such testimony, together with the arguments of counsel, made some 2,000 typewritten pages (Record, p. 147). The witnesses who gave these facts appeared, of course, voluntarily, as the appraisers had no authority to summon them, or to administer oaths, but it was agreed that they might be sworn, and their testimony was taken down by stenographers.

Some idea of the extent of the work is to be had from the cost of the appraisement to the company, exclusive of legal fees (Record, p. 130). This amounted to \$26,959.09, including payment for ninety-seven days' work to Benzenberg and one-half of the compensation of Mead for the same number of days. The remaining cost was vir-

tually all for the expense of getting up the inventory. It is safe to say that this expense amounted to at least \$12,000.

The general propriety and necessity of the schedules and blue prints prepared by the company are indicated by the testimony of four experts called by the company in this specific performance suit, and are conceded by Mr. Congdon, the lawyer member of the water board. The experts were Messrs. Cole, Randolph, MacHarg and Rundlett (Record, pp. 49 and ff. 58-9, 63-6, 68, 469, 471-2),

By the time the inventory had been completed and explained, it was the end of December, 1904. The representatives of the company and the city then propounded their theories of how the report of the appraisers should be made out and the valuations determined. But the amount of property was practically fixed and actually agreed upon as the result of the careful work of preparing and proving the inventory. Thereupon the matter was left to the appraisers for their further independent investigation and determination.

Practically no values had been stated by any witnesses. Mr. Wright, departing somewhat from his proposal, did produce witnesses as to the values of some parcels of real property, and there was a small amount of expert testimony as to the cost of a certain grade of stone and of certain other materials going into the rip-rap on the Missouri River; but otherwise no testimony as to valuations was given on either side.

On the last public hearing before the appraisers, the chairman of the board, with the assent of the other members, announced that, with the closing of what might be termed the formal evidence, the

real work of valuation was only just begun; that it would take a long time to examine in detail the various schedules and weigh the evidence presented, and examine the arguments; that "*undoubtedly much more information must be sought by the board than that already presented;*" and that the board would "*undoubtedly wish to call on the city and the company for special information as to details,*" the necessity for which would develop as the work proceeded; and finally, that it was "not a work of days or of weeks, but of months" (Record, p. 148).

Counsel for the company at that public hearing before the appraisers, at which counsel for the city were present, announced that all the books and vouchers and other papers of the water company were open for examination by the appraisers for their exclusive and confidential information, for the sole purpose of this appraisal (Record, p. 658).

In line with the suggestion that they might wish to call on either the company or the city for other information, the three appraisers went to the company's office on the day following the last public hearing and made a preliminary examination of the company's books, stating that they would get at the exhaustive examination of the books at some later time. Mr. Alvord, the city's appraiser, participated in this examination (Record, pp. 108-9).

The Appraisement Suit.

While the appraisers were still engaged on the task of fixing the valuation from the information they had obtained through the hearings and from the company's inventory, and through their per-

sonal investigation, they were induced by the city's representatives to go to Omaha (Record, pp. 464-5), and were thereupon served with process in a suit to enjoin them from continuing their appraisal, and to procure from the court specific directions as to how the appraisal should ultimately be made. The date on which this suit was begun is July 7, 1905. Both the water board and the city were the complainants, and the appraisers and the water company were the defendants (Record, p. 369).

It should be stated, in connection with this suit, that, by amendments to the Charter for Metropolitan Cities, enacted by the Legislature of Nebraska in 1905, apparently at the instance of members of the water board (Record, p. 465), control over the entire affairs of the city which related to the water supply had been transferred from the mayor and council to the water board (Record, p. 463). The essential features of the Act of 1905 are set forth in an appendix to this brief.

A temporary restraining order was obtained from Judge Munger on July 7, 1905 (Record, pp. 392, 481), and the appraisers were thus obliged to desist from their labors until further order of the court.

Meantime the case progressed. The company served an answer (Record, p. 394), taking issue with the water board. This answer was filed September 4, 1905.

This case has been known among the parties as the appraisalment suit. The bill of complaint set up an elaborate history of the water works and of the relations between the city and the company, and of the contract giving the city an option to buy the plant, and of the exercise of that option,

and of the progress of the appraisal until interrupted. In this historical statement the allegation was made (Record, pp. 372-3) that the company owned the entire plant which was operated by it at that time. This may be of some importance when it comes to considering objections to the company's title which have been raised in the present suit.

The bill then stated that, by reason of legal questions and of disagreement among the appraisers, and also between the city and the company, there ought to be a judicial determination of some of the questions between the various parties. Such questions it stated in the form of assertions that the claims of the company and the intentions of the appraisers were contrary to the law, and asked that the appraisers be instructed in the law.

The scope of the suit is manifest from the matters which the court was asked specifically to decide:

1. That the City of Omaha had no power to purchase, own or operate any part of the water works system lying outside the city limits and used in supplying the municipalities of South Omaha, East Omaha and Dundee.

2. That under Ordinance 423 and its amendments, the City of Omaha was required to purchase only that part of the water works which was within the City limits and such part of the said water works lying within Florence as was necessary and appurtenant to the use and operation of the water works for the supplying of Omaha with water.

3. That the appraisers should be directed to value the property as of the date of the award, or, in the alternative, as of the date of the submission, so called, to the appraisers.

4. That there must be no valuation of Governments lots 2, 3 and 4, in the City of Omaha, and the streets and alleys surrounding and within the lots and blocks belonging to the company at its Burt Street station.

5. That there must be excluded from the valuation the streets and alleys in Florence formerly underlying the lots owned by the company and occupied by its reservoirs.

6. That there must be excluded from the valuation the value of the right of way to the St. Paul Railroad, adjoining the company's reservoirs in Florence.

7. That from the valuation must be excluded the value of certain twenty-five acres of vacant land, owned by the company, near Krug's Park.

8. That there must be excluded from the valuation Lots 17 and 18 in Block 2 of Armstrong's Addition.

9. That a separate valuation must be returned of certain lots in Florence within the limits of the reservoirs, as to which it was claimed by the city that there was a dispute over the title.

10. That from the valuation should be excluded such increased value as may have arisen from the fact that, in order to supply South Omaha and other suburban communities, the mains were larger than they would have to be to supply Omaha alone.

11. That there should be excluded from the valuation the value of the Poppleton Avenue pumping station.

12. That there should be excluded from the valuation the cost of building up land and constructing rip-rap on the Missouri River, except so much thereof as the appraisers should find to be **absolutely necessary** for the protection of the company's property.

13. That there should be excluded from the valuation any sum for "going value" (Record, pp. 389-390).

Virtually all of the testimony taken in the appraisalment suit—continuing as late as June 16, 1906 (Record, p. 528)—has been incorporated as evidence in this record. The appraisalment suit never reached a final hearing, but an order was entered in November, 1905, upon the opinion of Judge Munger, the judge who tried the present case at Circuit. In his opinion (Record, p. 499) he said that the city evidently expected, in passing its ordinance of election in March, 1903, to purchase the whole property (Record, p. 500). He said, however, that he deemed it advisable to direct that the appraisers make their report in such form that the more important questions raised in the appraisalment suit might ultimately be determined in the suit for specific performance which would undoubtedly have to be brought. He pointed out that, if he failed to give such an order, the entire appraisal might possibly thereby be invalidated, because it might be determined that some item could not be taken over by the city, and there would be no record to show how much that item was worth. He intimated that the

pipe distribution in Florence would in any event have to be taken over, because the City of Florence would insist on that as part of the consideration for permitting the supply mains to Omaha to run through some of its streets, and for vacating other streets for the pumping and supply station. He expressly held that there was no merit in the contention of the city that in order to supply South Omaha, Dundee and East Omaha, the mains had been made too big for the uses of the City of Omaha, and declined to permit any deduction to be made on that account. As to the lots which it was alleged belonged to the City of Omaha, being Government lots 3 and 4, and inferentially as to the streets and alleys in Omaha, and the streets, alleys and disputed lots in Florence, he said that the company had used them so long that they were part of the company's plant and were to be valued irrespective of where the actual legal title stood (Record, p. 501).

His order, therefore, provided (Record, p. 502) that the appraisalment be made to include, separately:

- (1) Value of the system as a whole.
- (2) Value of that part of the system appurtenant to Omaha.
- (3) Value of the 25 acres near Krug's Park.
- (4) Value of the two lots of Armstrong's Addition.
- (5) Value of the company's property in South Omaha.
- (6) Value of the Company's property in East Omaha.
- (7) Value of the company's property in Dundee.

(8) Value of the company's property in Florence.

(9) Going value of the whole system.

(10) Going value of the part of the system appurtenant to Omaha.

(11) That, in accordance with the city's contention, the valuation be made substantially as of the date of the report.

Further Examination of the Company's Books.

After the order of November 29, 1905 was entered, the appraisers resumed work.

On January 3, 1906, Mr. Mead, as chairman of the board of appraisers, wrote a letter to the company stating that the board would next meet February 7, 8, 9 and 10, at Cincinnati (where it appears that Mr. Benzenberg was consulting engineer of that city with respect to its municipal water works), and asking the company to send its books to Cincinnati at that time (Record, p. 156). The city learned of this request, there being no concealment of the company's continued readiness to submit its books to the appraisers (Record, p. 171), and on February 3, 1906, wrote to the appraisers a letter referring to the original statement on behalf of the company in that regard, but insisting that, if the appraisers were to examine the books, the city should have an opportunity to be present when the books were examined, and to make a personal examination either by its attorneys or by an accountant "of all the matters and things in said books" (Record, pp. 170-171).

The books were sent as requested, and Mr. Fairfield, the general manager of the company, and Mr.

Heth, the treasurer of the company, went to Cincinnati to be there at the time of the meeting. Mr. Fairfield saw some of the books opened in the room where all the appraisers were. Mr. Heth did not attend any of the meetings. Mr. Fairfield had no conversation with the appraisers bearing on anything in the books. He was informed by them that the city had protested against this private submission of the books. He replied that he did not see why the appraisers were not at liberty to receive any information they chose to use, and that the information contained in the books was confidential, and that this method of offering the information was supported by precedent, adding that such had all along been the company's attitude (Record, p. 107).

The books consisted of the journals, ledgers, cash books and voucher registers from 1896 to 1905, being at least 30 volumes. The appraisers decided upon an expert examination of the books, and accordingly directed the chairman to send the books to Chicago to be verified by an auditing company. Mr. Heth was requested to present himself at Chicago, in order to explain the books to the auditor, if required. He went to Chicago and had two or three interviews with Mr. Mead, but not with reference to any items in the books. The books were handed over to an auditing company, and Mr. Heth from time to time was asked questions, but never volunteered any information and merely answered the queries that were made of him. No representative of the water company was present during any examination of the books of the appraisers, and none has even seen the report made by the auditor. There is nothing in the record which throws any

light on the nature of the auditor's report, or the use made of it by the appraisers. There is no intimation that the books were inaccurate, or that the appraisers obtained any untrustworthy information therefrom. Considerable testimony as to the books appears in the present case (Record, pp. 69, 86-90, 152-157, 476-484, 657-663).

As will be seen later, the trial judge dismissed this specific performance suit on the ground that the private examination of the books by the appraisers was improper.

It appears that from time to time while the appraisal was pending, the water board, through its chairman, and evidently through the city attorney also, was in communication with the appraiser selected by the city, discussing matters of valuation and arguing other questions in connection with the appraisal, without notice to the water company or its counsel, and without treating the proceeding before the appraisers as in any sense an arbitration. (Record, pp. 85-87, 569, 481-485.)

Coming in of the Appraisers' Report.

In anticipation of the report of the appraisers, the board of directors of the water company met on June 14, 1906, and formally authorized the president to execute a deed and convey the company's property to the city at whatever valuation should be fixed by the appraisers in their report (Record, pp. 183). The deed was prepared in New York and completed in Omaha, and was executed by the president (Record, pp. 35 and ff., 128-129). About July 6, Mr. Wright, the attorney for the city in the appraisal proceedings,

got word from Mr. Alvord that the report of the appraisers was to come out on July 7. He accordingly went to Chicago by direction of some or all the members of the water board (Record, pp. 85-87). The report was signed July 7, and was in the form directed by Judge Munger (Record, p. 159). It made the separate appraisals that were called for by the Judge's order. The important feature is the appraisal of the whole system at the sum of \$6,263,295.49 (Record, p. 164). Mr. Wright telegraphed to Mr. Barlow, chairman of the water board, from Chicago (Record, pp. 82 and 85), and took the night train for Omaha. On Sunday morning, July 8, all the members of the water board, together with Messrs. Webster and Wright, got together to receive Mr. Wright's report. It does not appear that he had a copy of the report, but he had all the necessary information which it contained. It was decided that the board should claim and undertake to exercise authority under the law of 1905 to reject the appraisal, and a resolution was drawn up for that purpose (Record, p. 166). It was arranged that the formal meeting, which the act constituting the water board requires to be public in every instance, should be held on Monday, but that no discussion should be had thereat (Record, pp. 88-89).

The report of the appraisers was signed by Messrs. Mead and Benzenberg, but Mr. Alvord, in signing (Record, p. 165) said:

"I do not concur in the above report, nor in the values as fixed therein".

City's Refusal to take the Property.

The report of the appraisers was received by the secretary of the water board on July 9, 1906,

(Record, pp. 110-111). The company also received a copy of the report on that same day, and Mr. Woodbury, the president of the company, then called on the mayor of the city and on Mr. Barlow, the chairman of the water board, and tendered the deed and demanded payment. The deed which was tendered was a deed of all the company's property, of every shape and kind, including not only the property described in the master's deed, but all after-acquired property (Record, p. 723).

The water board met formally in the evening of July 9, (Record, pp. 111-112), and, without comment, passed the resolution already agreed upon (Record, p. 166).

Specific Performance Suit.

Upon the refusal of the city to complete the purchase, this suit was begun to compel the city to take the property, and the entire property, and to pay therefor the price fixed by the board of appraisers as stated in their report, namely, \$6,263,295.49.

The bill of complaint set up such facts out of those heretofore explained as were necessary for the bill, and demanded judgment that the city be compelled to perform its part of the contract. The answer, dated September 3, 1906 (Record, p. 33), was not filed until after a meeting of the water board had been held (Record, p. 721), at which, in furtherance of its resolution to reject the appraisal, the board pretended to order a new appraisal and the appointment of a new appraiser. When it came to the answer, however, the counsel for the city plainly showed that it was their purpose to get the city out of the contract altogether.

The answer contains a number of denials which need not be noticed, and also contains what might be termed affirmative defenses, which substantially repeat the grounds upon which the resolution of the water board based the declared rejection of the appraisers' report. It was upon these affirmative defenses that the city depended. They begin at paragraph 15 (Record, p. 25).

After the testimony was all in, this case proceeded for final hearing and argument before Judge Munger on May 13, 14 and 15, 1907, the case being submitted on the last named date. On June 4, Judge Munger handed down his opinion, in which he expressly declined to touch on any subject except that of the examination of the books by the appraisers at Cincinnati and Chicago, against the protest of the city. He said (Record, p. 186):

“Undoubtedly the water company was not required, if they did not see fit, to offer their books as evidence, or permit them to be examined by the appraisers, but when they offered them to be examined by the appraisers it should have been done as any other evidence is offered, so as to afford the opposite party an opportunity to cross-examine or controvert.

The award being invalid for this reason, it follows that the relief asked by complainant must be denied. *As the case will doubtless be appealed, I do not express my views upon the other questions raised and fully argued.*”

Judgment was entered accordingly, on June 29, from which an appeal was taken by the company to the Circuit Court of Appeals (Record, p. 189).

The appeal was argued January 7, 1908, and on April 7, 1908, a decision was rendered revers-

ing the decree below and remanding the cause for proceedings in accordance with the opinion of the court.

The syllabus of the reported decision is as follows:

"1. WATERS AND WATER COURSES—CONTRACT BY CITY FOR PURCHASE OF WATERWORKS—ASCERTAINMENT OF VALUE BY APPRAISERS—VALIDITY OF APPRAISAL.

A city ordinance granting a franchise to a water company reserved to the city the right, at its election, to purchase the works of the company after a stated term at an appraised valuation 'ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company and these two to select a third.' The city having elected under authority of a state statute to exercise its option, appraisers were selected as therein provided, who organized as a board, and, after an investigation extending over three years filed a report fixing the value of the property, which was signed by two of the number, but upon which the third noted his dissent. *Held*, that the matter in question was one of public concern, and that, under the rule of law applicable in such case, the appraisers having all qualified and acted throughout, the decision of the majority was a valid exercise of the power.

2. PROCEDURE BY APPRAISERS.

The fact that appraisers selected to make a valuation of the property of a water company, which a city had elected to purchase under an option reserved in the company's franchise, took the oral testimony of witnesses who were examined by counsel for the respective parties, did not limit them to such

method of procedure throughout, where it was understood and agreed by the parties in the beginning that they might arrive at the facts by any method or means deemed advisable by them, and their subsequent action in causing the books of the company to be sent to another city where they were in session, and to be there examined by experts, in the absence of counsel, did not invalidate their appraisal where their good faith was not questioned.

3. SAME—POWERS OF APPRAISERS—DISCRETION AS TO METHODS OF PROCEDURE.

A valuation of property by appraisers selected as experts under a contract for its sale is not an arbitration, and the appraisers do not act judicially, nor are they bound by the rules relating to arbitrations, but, so long as they act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information.

4. MUNICIPAL CORPORATIONS—POWERS—PURCHASE OF WATERWORKS—CONSTRUCTION AND VALIDITY OF CONTRACT.

In 1880 the city of Omaha granted a franchise to a water company under Laws Neb. 1879, p. 99, Sec. 27, which authorized the city to construct and maintain waterworks 'either within or without the corporate limits of the city,' and to contract with others to construct and maintain waterworks on such terms as might be agreed upon. In the ordinance granting such franchise, the city reserved the right to purchase the works of the company after 20 years at an appraised valuation. By a subsequent statute, still in force in 1903, the city was authorized to appropriate private property for waterworks purposes, or any system already constructed, the power

to extend a distance of 10 miles beyond the city limits. Laws 1903, p. 66, c. 12, required the city to either construct or purchase water-works and authorized it to take the necessary steps to acquire such water plant 'by virtue of any rights inuring to such city through contract or otherwise.' In 1903 the city elected to purchase the company's plant under the option reserved in the ordinance of 1880, and appraisers were selected by the parties to make the valuation. When the works were constructed, it was necessary to take the water from the Missouri river above the city, and the intake, pumping station, and reservoirs were located in the town of Florence, and some miles outside the city limits. Between that time and 1903 the city had grown in population from 30,000 to 125,000 or more; the adjoining city of South Omaha containing over 30,000 population, and other adjoining, but separate municipalities had grown up, into all of which, including the town of Florence, the company had extended its distribution system which was supplied with water from its station at Florence. *Held*, that, under such statutes, the city had power to acquire the property of the company outside, as well as inside, of its limits, and that, when it made its election, it elected to purchase the entire system, and could not require the company to sell its pumping plant and the pipes connected therewith which extended into and lay within the city limits, and to retain its outlying distribution systems.

5. CONSTITUTIONAL LAW—CONTRACTS PROTECTED FROM IMPAIRMENT—CONTRACT BY CITY.

The election by a city, expressed by ordinance duly authorized by statute, to exercise an option reserved in a prior ordinance to purchase the property of a water company,

which ordinance was accepted by the company, creates a contract binding on both parties, and which cannot be impaired by any subsequent action of the city or of the Legislature of the state taken after the property has been appraised as provided by such contract.

6. WATERS AND WATER COURSES—CONTRACT BY CITY FOR PURCHASE OF WATERWORKS—VALIDITY OF APPRAISAL.

An appraisal of a large system of waterworks under a contract of purchase will not be invalidated because the title to a small part of the property not vital to the integrity of the system is afterward found to be defective, nor because it may include pieces of property not necessary to the system; a court having power to make an equitable adjustment of such matters between the parties."

POINT I.

There was no misconduct, nor any improper procedure, on the part of the Board of Appraisers in the examination of the Water Company's books.

1. There was no concealment nor any secrecy with respect to such examination.

The company's position in this regard was clearly and firmly stated by its counsel at a public hearing before the board of appraisers, in the presence of counsel for the city, as follows:

"Now for the water company we desire to say that all the books and vouchers and other papers of the water company are open for examination by the appraisers for their exclusive and confidential information for the sole purpose of this appraisal, and are offered by the water company for that purpose" (Record, p. 658).

The record shows that on the day after the taking of oral testimony closed, the three appraisers went to the water company's office and made a preliminary examination of the company's books, learning specially the company's method of book-keeping, a fact of which counsel for the city were informed (Record, p. 658).

After the injunction obtained by the city in the appraisement suit, staying for some months the proceedings of the appraisers, had been lifted, the company's books of account were sent, on written request of the chairman of the board, to Cincinnati, where the next meeting of the board was to be held (Record, p. 156). It appears that Mr. Benzenberg, one of the appraisers, held a prominent position in Cincinnati, in connection with the water works of that city (Record, pp. 41, 103). Meetings of the board were also held in Chicago, where Mr. Mead and Mr. Alvord, the other appraisers, had offices (Record, p. 103).

There was no concealment about the examination of the books. There could have been none, since it appears that from first to last no meeting of the appraisers was held, no examination of property or inspection of the books made, and no step in procedure taken, without the knowledge and concurrence of the appraiser selected by the city. The city was also advised of the company's intention (Record, p. 171). Notice of the pro-

posed examination of the books was given to counsel for the city, presumably by this appraiser, and the boxes containing the books were opened in the presence of this appraiser (Record, p. 95).

The water company was not represented by counsel then, or at any time while the books were in the possession of the board of appraisers, but through its general manager adhered to the position previously publicly stated, that the company declined to allow counsel for the city to inspect its books, claiming that if the appraisers desired to inspect the books, the inspection by all of the appraisers was a sufficient representation for the city (Record, pp. 107, 132).

The books consisted of general ledgers, journals, voucher registers and cash books, thirty or forty books in all, covering the business of the company for nine or ten years (Record, p. 99).

The general manager and treasurer of the company were present in Cincinnati, at the request of the appraisers, to give any information that might be desired with regard to the books (Record, p. 93), but only the general manager appeared before the appraisers, and he was not present at any discussion or conference of the board. No questions were asked regarding the contents of the books, nor does it appear that any examination of the books was made at Cincinnati, where the books were left in the custody of the board. It appears from the evidence that when the books were placed in the possession of the appraisers, all of the appraisers were present (Record, p. 107).

Without consulting the representatives of the water company, the board of appraisers decided to submit the company's books to an audit com-

pany, and they were sent accordingly by the appraisers to the American Audit Company, of Chicago. At the request of the chairman of the board, the treasurer of the company attended at Chicago to give any information desired, but had nothing to do with auditing the books in any way (Record, pp. 96, 101, 104).

The report made by the audit company to the board was never communicated to the water company by the audit company, with whom the books remained for some two weeks (Record, pp. 101, 105).

There is no evidence in the case of what use, if any, was made of the audit company's report by the board of appraisers.

The books might, with entire propriety, have been examined by the appraisers in the company's office at Omaha, and with the aid of the company's bookkeepers, had the appraisers found it convenient to attend there. It was none the less proper for the appraisers to examine the books on neutral ground and with the aid of an auditor of their own selection. It was completely within the province of the appraisers to pass upon the facts which the books disclosed, and to make such use of the information as would aid them in the appraisal.

Upon all the facts disclosed by the evidence, the Circuit Court of Appeals has distinctly found that "there was no concealment" (167 Fed. 233).

2. The books were not offered in evidence in any technical sense.

The Circuit Court gave as its reason for dismissing complainant's bill:

"Undoubtedly the water company was not required, if they did not see fit, to offer their books as evidence, or permit them to be ex-

amined by the appraisers, but when they offered them to be examined by the appraisers, it should have been done as any other evidence is offered, so as to afford the opposite party an opportunity to cross-examine or controvert" (Record, p. 186).

This is clearly a mistaken view of the matter. The company never undertook to prove anything by the books, and never specified any particular purpose for which the books might be considered by the appraisers. No specific entries from the books were at any time drawn to the attention of the appraisers, nor was any testimony given regarding the contents of the books. The company was not in a position to know for what special purpose, or to what extent for any purpose, the appraisers would make use of the books. Manifestly, until specific entries from the books, or testimony with regard to their contents, should be formally offered in evidence for a definite purpose, no occasion could arise for cross-examination or contravention.

There could properly be no cross-examination of the books themselves. Their contents could not be changed. The only questions which could arise would be the question of their correctness and the question of what they showed. The first of these questions was settled by the board of appraisers through employment of an independent auditor. The second question was a matter for the judgment of the board. In the absence of testimony in support of the entries, there was no opening for cross-examination of any kind.

On a trial before the court, or in an arbitration, no general offer of evidence of books, papers and vouchers would be allowable, but, under the

circumstances of this appraisal, the company could scarcely have done less than to open its books and records to the examination of the appraisers. For it may well be doubted if "the water company was not required, if they did not see fit, to offer their books in evidence, or permit them to be examined by the appraisers." It was quite within the province of the appraisers to go to the company's office at any time and ask for any information from its books, without notice to counsel for either party—a privilege of inquiry to which the city was certainly not entitled. The proffer on behalf of the company was merely to the effect that the appraisers were welcome to do this, provided that the information obtained should be used for the sole purpose of the appraisal.

Any other course would obviously have been impracticable. It would have involved the specific offer of all the numerous and voluminous books, to become a part of a record without knowledge or intimation of how much of their contents would be deemed by the appraisers relevant or useful. It would virtually have necessitated the presence of the counsel for both parties during the deliberations of the appraisers concerning the entries which they might deem important, with consequent discussion of the extent to which the appraisers might avail themselves of the information. In other words, it would, without warrant, have transformed the appraisal into a continuous judicial trial, and have made such an appraisal as was provided for in the ordinance impossible.

3. The company was entirely within its rights in restricting the examination of its books to the sole purpose of the appraisal.

It would be an unheard-of thing—certainly unknown in appraisals of this character—to permit the representatives of the city to explore “all the matters and things” (Record, p. 171), in the books of the company pending the appraisement, with consequent freedom to use, for purposes outside the appraisement, including other litigation, the information thus gained. The city would thus be put in possession of a complete knowledge of the company’s business affairs—really a valuable part of its property—without payment of any compensation whatever. Having acquired this important advantage, the city could retain and use it adversely, while refusing—as it is refusing—to take over the works and pay the price and thus complete the purchase.

This Court can take judicial notice that at the time these books were examined by the appraisers, there was a controversy between the water company and the city with respect to an attempted reduction of rates to private consumers, which the company contended would impair a subsisting contract, but in which the city moved nevertheless to compel the production of the company’s books in support of the reduction. The city’s motion was denied, and the company’s main contention was sustained by the Circuit Court of Appeals, and an appeal from its decision was dismissed by this Court, and a writ of certiorari was denied.

Omaha Water Company v. City of Omaha, 147 Fed. 1, 15;

The City of Omaha v. Omaha Water Company, 207 U. S. 584;

Fairfield, et al. v. United States, 146 Fed. 508.

4. Complete protection of the rights and interests of the city was afforded through the presence of the appraiser of its selection during the examination of the books, and by the presence of the chairman selected by the two other appraisers.

It appears from the record that in whatever was done by the appraisers relative to the examination of the company's books, the appraiser selected by the city concurred and took part. Thus, the chairman of the board in his letter to the company asking that the books be brought to Cincinnati, expressed the desire of all the appraisers (Record, p. 156), and all the appraisers were together during the continuance of the appraisers' meeting in that city (Record, pp. 94, 95, 105).

From that time on, the books were exclusively in the custody of the board or the audit company, until returned to the water company, and during whatever examination the appraisers may have made of the books, the company was no more represented than was the city.

There is no evidence nor pretense in the case that there was any unfairness in the examination of the books, or in any use of their contents, or that anything was done in connection with their examination to the actual prejudice of the city.

POINT II.

The board of appraisers was not subject to the rules of procedure governing arbitrations.

1. In support of the contention that the procedure of the board of appraisers relative to the examination of the company's books was improper, counsel for the city are forced to disregard their own private conferences with the appraiser selected by the city, and to invoke the rules which courts have laid down with respect to arbitrations, and thus to rest their contention upon the barest technicality.

Counsel for the company concede that, in cases of arbitration, the general rule is that parties to the controversy must have notice of hearings before the arbitrators, and that the witnesses must be examined under oath, unless the taking of an oath be waived, and must be examined in the presence of the parties, who have the right to cross-examine.

Lutz v. Linthicum, 8 Peters 165;
People ex rel. Bliss v. Board of Supervisors, 15 N. Y. Supp. 748.

The reason for this rule is clearly that an arbitration, whether instituted by a submission at common law or under statutes, is a judicial proceeding, and that arbitrators constitute a judicial body, and therefore that their action under a submission involves a trial of the issues, and that their procedure becomes subject to rules analogous for the most part to those which govern other judicial proceedings.

Words and Phrases Judicially Defined, Vol. I, pp. 487 to 490.

An arbitration, however, pre-supposes a pre-existing controversy or difference, which is to be determined by the arbitrators through an award akin to the judgment of a court.

Garr v. Gomez, 9 Wend. 649, 651.

Yet even in cases of arbitration, the strict rules governing the trials and decisions of courts are not always applied.

Thus, in *Hall v. Norwalk Fire Insurance Co.*, 57 Conn. 105, it was held:

"Arbitrators are not forced to follow strict rules of law, unless it be a condition that they shall do so. (p. 117) * * * * *

Again, if, as is directly found in this case, persons are selected arbitrators by reason of special knowledge or skill possessed by them with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon their personal information, investigation and judgment, they may even be justified in refusing altogether to hear evidence (p. 117) * * * * *

The inquiry made by Mead, for his own information, as to the prices paid for labor in Wallingford, in the absence of the parties and of the other arbitrator, will not be sufficient to set aside the award, unless it appears (and it does not in this case) that the plaintiff was prejudiced or that the decision was affected thereby" (p. 117).

Cited with approval in *Continental Ins. Co. v. Garrett*, 125 Fed. 589, where the court said:

"If the character of the matter submitted and of the arbitrators chosen is such as to justify an inference that the appraisers were selected to act as experts, and adjudge the

matter from their own knowledge, it is not essential that notice shall be given or evidence heard unless the submission so provides" (p. 592).

2. The subject of the present review is not an arbitration but an appraisal; and the determination of the matter submitted to the board of appraisers is not an award, but an appraisalment.

There is a clear and vital distinction between the two cases. The distinction runs through the proceeding from beginning to end. It concerns the origin and nature of the proceeding, the official character of the persons who are chosen to determine the matter submitted, the rules governing their procedure and method of determination, and the quality and effect of their decision.

Thus, an appraisal is not due to a submission at common law or under a statute. It arises from an agreement, or a provision in the nature of an agreement. It does not presuppose an existing dispute or difference, but is a method agreed upon in advance for ascertaining, for the benefit of both parties, an incidental valuation necessary to the completion of a purchase or the consummation of some other engagement between them. The appraisers are not judicial officers, although their duties necessarily assume a semi-judicial character. They do not constitute a court and are not invested with the authority which pertains to arbitrators and referees. They have no power to compel the attendance of witnesses or to require witnesses to be sworn. Consequently they are not bound by the statements of those whose testimony is submitted to them. Whether or not they may care to listen to any evidence which the parties may choose to present, they

may entirely disregard such evidence. From the necessity of the case, they may seek information outside the testimony submitted, may make inquiries of others than the witnesses produced, may make investigations without the aid of the parties and without their presence, and may rely upon their own observations and judgment.

When their decision is reached and declared, it is not a determination in the nature of a judgment, nor an award for the enforcement of which a suit may be brought. Their report is simply the ascertainment of a price or valuation which, so soon as it is ascertained, fits into the original agreement or engagement with the same effect as if it had been inserted therein when the agreement or engagement was made. While an award, as such, is subject to enforcement or review by the courts, and may be set aside on merely technical grounds, the report of appraisers is not separately enforceable, but only as part of the agreement or engagement into which it fits, and cannot be reviewed as a judicial determination, and cannot be impeached, except upon clear proof of corruption, partiality or actual misconduct.

While, even in an arbitration, the strictest rules of procedure and adjudication are somewhat relaxed, in an appraisal they are, unless provision to the contrary be made by the parties, dispensed with altogether. Where no such provision has been made—certainly where a latitude of procedure is specifically assented to by the parties—the procedure and methods adopted by the board of appraisers cannot be subsequently questioned by either party, except upon grounds which involve actual fraud.

In the present case, there was no pre-existing matter of dispute or controversy between the

City of Omaha and the Omaha Water Company, when the appraisal was instituted. There was no offer by the city for the works of the water company, nor any demand of a price by the water company. Having the right, by the terms of the ordinance of 1880, to purchase the water works at the end of twenty years, the city, without preliminary negotiation, elected to exercise the right, and appointed an engineer as one of the appraisers by whom the price was to be determined. Upon that election an irrevocable contract of purchase was made. Upon the appointment by the water company of another engineer, as the second appraiser for the same purpose, and the selection of an engineer as the third appraiser, an appraisal was set on foot which neither party could recall, and from the result of which neither party could escape.

3. The vital distinction between an arbitration and an appraisal has been clearly and uniformly recognized from remote time by the courts.

Thus in *Leeds v. Burrows*, 12 East 1, decided in 1810, where there was an agreement between an outgoing and incoming tenant, that the latter should buy the hay of the former upon the farm, and that the former should allow the latter the expenses of certain repairs, the value of the hay and of the repairs to be settled by third persons, it was held, on appeal after the first trial, that the balance settled thus as due for the hay might be recovered upon a general *indebitatus assumpsit* for goods sold and delivered.

The plaintiff having recovered a verdict on the second trial, a motion for a nonsuit was made on the ground that the agreement was not within the

terms of the appraisement stamp act, but should bear an award stamp.

Lord Ellenborough, C. J., said that "it was only appointing persons to settle an account of what was due between the parties for the value of the different articles, and that the parties had no contemplation of submitting any differences to the award of arbitrators," and he therefore refused the rule (p. 6).

In the matter of *Lee v. Hemingway*, 3 Nev. & M., 860, Note to *Parkes v. Smith*, 15 Q. B. 305 (decided in 1834), the parties had agreed by deed that one should purchase from the other certain shares in a mine at a price to be ascertained by arbitrators, the conveyance to be made on payment of the money. Two awards having been made for different parts of the property, the seller tendered conveyances and demanded payment, which was refused. On application for an attachment against the purchaser, as for non-payment of awards under the Statute, 9 and 10 W. 3, C. 15, the attachment was refused, although the agreement had been made a rule of court.

The grounds of the refusal are fully stated in the opinion in *Collins v. Collins*, 26 Beav., 306, cited later.

In *Eads v. Williams*, 4 De Gex, MacNaghten & Gordon, 674, decided in 1854, a suit for specific performance, it was held that it was not a valid objection to the report with regard to the value of a mine, that the referees had refused to examine witnesses, or that one of the referees, instead of inspecting the mine, had acted on the report made to him by another person.

Collins v. Collins, 26 Beav., 306 (1858), was the case of a written contract between parties for sale

of a brewery and plant at a valuation by two valuers, who were to "choose an umpire before entering upon the valuation."

Upon failure of the two to agree upon an umpire, a summons was taken out, under the statute, for the appointment of an arbitrator by the judge. Provision for this was made by the statute "in any case of arbitration."

The application was denied, and the Master of the Rolls said:

"I do not think that in this particular case, the fixing of the price of the property is an arbitration in the proper sense of the term. An arbitration is the reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one that may arise is a material one, and one which may be properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them.

* * * * *

"Undoubtedly if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, they say, 'We will refer this question of price to A. B., he shall settle it,' and thereupon they agree that the matter shall be settled by his arbitration, that would appear to be an 'arbitration,' in the proper sense of the term and within the meaning of the act: but if they agree to a price to be fixed

by another, that does not appear to me to be an arbitration.

"It appears to me that the case of *Leeds v. Burrows* (12 East 1) draws the proper and fit distinction between an *arbitration*, in the proper sense of the term, and an appraisal or valuation, for valuation undoubtedly precludes differences in the proper sense of the term; it prevents differences, and does not settle any which have arisen. The distinction seems to be drawn in the case of *Hemingway's Case*, cited in a note to the case of *Parkes v. Smith* (15 Q. B., 305). There was an agreement to sell land at a particular price to be fixed by award, and they came for an attachment under the award, and said it was an arbitration; but Mr. Justice *Littledale* very clearly pointed out the distinction; he says: 'This is not properly an arbitration, it is in effect an agreement to sell the land, and this is not the settlement of any difference between them, but merely something auxiliary to the contract entered into between them for the purpose of the sale of the land. Accordingly, upon a breach of the contract, you have your remedy, for it is clear, that a specific performance would have lain here in that case. It is clear also, that an action would have lain for damages, but not being an award, because it was not a matter in difference that was referred to these parties, you cannot have it by way of attachment.'

"Therein lies the distinction, and which is approved of by Lord Campbell, who thought it proper and one which he must adopt" (pp. 311-14).

In *Bottomley v. Ambler*, 32 L. T. N. S. 545 (1878), certain matters relating to a lease and the rent payable thereunder were referred to two arbitrators, and, in case they should differ, to an umpire. The arbitrators met without the presence of

the parties or their solicitors and discussed the matters referred, but without having any witnesses before them. As they could not agree, the matters referred were brought before the umpire, who only heard the statements of the arbitrators and then made his award.

The award was set aside by the Master of the Rolls, on the ground of irregularity, but on appeal was sustained.

THESIGER, L. J., said:

“In such a case as this the arbitrators are not arbitrators in the sense in which arbitrators are appointed in an ordinary case, where they are appointed to ascertain facts and to apply the law to the facts brought before them on evidence. No doubt an arbitrator ought not to make himself a partisan of one side. But in a mere case of valuation it is a thing much to be regretted that the usual course in such cases should be departed from. In such a case the arbitrators, being experts, may by means of their special knowledge and their acquaintance with the facts of the case as the agents of the parties, avoid the expensive machinery of an ordinary arbitration.”

James, L. J., added:

“I am of the same opinion. The subject-matter of the reference is essentially one of valuation and opinion. The arbitrators were the paid agents of the parties interested, and it would be absurd to suppose that they were intended to sit with all the pomp of judges” (p. 546).

The distinction is also stated in *Fry on Specific Performance*, Second Edition, as follows:

"Sec. 341. The persons nominated to value are sometimes, though inaccurately, spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute; valuers to ascertain the value of the subject-matter of the sale."

In this country the distinction was stated by Senator Seward, in 1832, in *Garr v. Gomez*, 9 Wend., 649, as follows:

"A distinction is justly made between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is conclusive of nothing as to the rights of the parties, except the mere appraisal or statement, and a submission of matters in controversy for the purpose of final determination.

This distinction is indirectly suggested in the case of *Elmendorf v. Harris*, 5 Wendell, 522, and is more plainly stated in a note under the same case by the reporter" (p. 661).

In *Garrard v. Macey*, 10 Mo., 161, decided in 1846, it was held that, where an agreement provided that in consideration of the giving possession of certain public land by one party to another, the latter should pay the value of the improvements, to be ascertained by five householders, the decision of the persons thus selected was not an award, upon which an action could be brought, but that the party in whose favor the decision was made could only recover on the agreement.

A similar ruling was made in *Curry v. Lackey*, 35 Mo., 389 (1858).

In *Kelly v. Crawford*, decided by this Court in 1866, 5 Wall., 785, where it had been referred by

agreement to an accountant to ascertain from the books of one of the parties the amount of indebtedness to the other, objections were made that in writing up the books, correcting errors discovered, and making entries of what had been omitted by oversight or mistake, the accountant had exceeded the submission, and that his report was therefore void.

These objections were overruled, and this Court said:

“The principal objections urged for a reversal of the judgment rest upon the idea that the agreement of September 13th, 1861, was a submission to arbitration, and the report or statement of Quigg was the award of an arbitrator; and that both are to be judged by the strict rules applicable to arbitrations and awards. This is, however, a mistaken view of the agreement and report. As observed by counsel, there was no dispute or controversy between the parties to be submitted to arbitration; nor was anything to be submitted to the judgment or discretion of Quigg. The books of account of the defendants were to determine the amount due; about these there was no controversy. The only duty of Quigg was to examine them as an accountant and to state what they exhibited” (p. 790).

Green & Coates Streets Pass. Ry. Co. v. Moore, 64 Pa., 79 (1870), was a case where a railway company accepted a charter on the condition that it should purchase, at the option of the owners, the horses, etc., of an omnibus line, at a price to be assessed by three appraisers, chosen pursuant to the charter, one by each party and the third by the two thus chosen. There was an appraisal concurred in by two of the appraisers, and

an appraisement for a considerably less amount by the third appraiser. Throughout the varied litigation which followed, the contention of the defendant that the appraisement was invalid because it was an appraisement by two only of the appraisers was invariably overruled. But the statute of limitations was held to be a bar to plaintiff's ultimate claim, on the ground that the appraisement was not an award, to be sued upon as such, but an appraisement which became a part of the contract, on which suit should have been brought.

The Court said, Sharswood, J., writing the opinion:

"An award is the judgment of a tribunal selected by the parties to determine matters actually in variance between them—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterward, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. *The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons.* When the original contract is established by competent and sufficient evidence, then indeed the assessment thus made by authority of the parties . . . may be conclusive as to the price.

Nor is such an appraisement subject to the strict rules governing arbitrations and awards: *Kelly v. Crawford*, 5 Wall. (S. C.) 785. *It would not be necessary that the appraisers should decide upon evidence heard in the presence of the parties. They could decide, and indeed would be expected to fix the value of the articles, upon their own*

knowledge of the subject, though doubtless they might seek information from other quarters" (p. 91).

Palmer v. Clark, 106 Mass. 373 (1871) involved the construction of an agreement by which one of the parties was to pay the other, for filling in certain city lots with gravel, a sum proportionate to the amount of filling, as "measured on the ground by the city engineer." The measurements were first made by the city engineer's assistant, and were revised on the ground by the city engineer himself, and certified as correct. In an action to recover on the contract, the defendant alleged that the engineer's certificates were "so grossly inaccurate as to be fraudulent and void," and also alleged that the engineer could not revise a first certificate, and that his certificate could not be conclusive, because the measurements were not made by him or in his presence.

A judgment for the plaintiff was affirmed and the court said:

"A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive" (p. 389).

This decision is cited with full approval in *N. E. Trust Co. v. Abbott*, 162 Mass., 148 (1894).

Norton v. Gale, 95 Ill. 533 (1880) was a case where leases provided for rent to be paid yearly at six per cent. on the value of the premises, to be appraised by two property holders, who were to choose an umpire in case of their failure to agree. The two did agree on an appraisal made without notice to the parties and after refusal to hear appellants' witnesses on the question of value, and argument thereon by his counsel.

It was held that it was not a submission to arbitration, and that no notice to the parties was necessary before making the appraisal, where the lease did not so require, and that the finding of the appraisers would be conclusive upon the parties except for fraud.

The court said:

"The most serious objection urged against the judgment below is that the stipulation to refer the question of the value of the property to holders of real property in Chicago, as provided in the leases, is a submission of that question to arbitrators, and that the valuation made by Clark and Fuller is an award and not merely an appraisal; and, being an award, it is void, because made without notice to the parties to the submission—and after refusal to hear appellant's witnesses on the question of value, and argument thereon by his counsel, which evidence and argument, it is claimed, would have shown that the valuation, as made, is unjust to him. There was no evidence introduced, or offered, showing that the valuation, as made, was not the honest expression of the judgments of the

appraisers, and the only question in reality, is, was appellant entitled to notice and to be heard on the question of value? If he was not, there was nothing in the evidence introduced or offered showing objectionable conduct in the appraisers" (pp. 539, 540).

After discussion of authorities, the court goes on to say:

"There was, here, no matter in controversy when the leases were executed, or, for that matter, when the appraisers were selected, and the object was to preclude or prevent the arising of differences, and not to settle differences which had arisen" (p. 543).

Stose v. Heissler, 120 Ill., 433 (1887) was a similar case, where three persons were chosen in the usual way by the parties to a lease to fix future rent. It was held not to be a case of arbitration in the strict sense for the reason that "there was no difference or dispute between the parties to be settled." Citing *Norton v. Gale*, 95 Ill., 533, and, with reference to the provision in that case for an appraisal of property as a basis of rental by two appraisers, who, on failure to agree, might choose an umpire, the court said:

"The two appraisers did agree, but failed to give the parties notice of the time and place of meeting, which failure to give the parties an opportunity to be heard would have been fatal had the proceeding been an arbitration of matters in dispute" (p. 437).

In *James v. Schroeder*, 61 Mich., 28 (1886), where there was an agreement to leave the value of a pier to a person named and two other persons to be selected by him, all of whom were

spoken of in the agreement as "referees," the court held:

"This so-called reference was nothing more nor less than *an appraisal by appraisers* on their own inspection; and, in our opinion, there was no occasion for the presence of any one else. *It must be conclusively presumed that their judgment, if honest, was correct, and that it was honest if not shown to be otherwise.* The record shows nothing having a legal tendency to impeach it" (p. 32).

In *Noble v. Grandin*, 125 Mich., 383 (1900), the court passed on a contract by which the amount of the purchase price of certain timber lands was to be determined by the estimate of three appraisers. It was claimed that the contract was an agreement to submit to arbitration, and that the arbitrators had acted fraudulently in failing to estimate all the timber, that they made mistakes, that they did not correctly locate the different descriptions of land, and so on.

The court said (p. 390):

"There might, and undoubtedly would, be some force in these claims, if the contract can be construed as a submission to arbitration; but we are satisfied it cannot be so construed. Under this agreement the parties named therein were simply to estimate the merchantable pine timber on the land, and determine the amount, and make a report to the parties to the contract as soon as it could be correctly done. This, most certainly, is not a submission to arbitration. The theory of an arbitration is that it is a substitute for a proceeding in court. Such agreements can be revoked by either party, and notice of the time and place of meeting of the arbitrators

must be given the parties, so that they may have the opportunity to be heard. *There is a broad distinction between a submission to arbitration and the reference of a collateral or incidental matter of appraisement, measurement or calculation.*"

In *M. E. Church v. Seitz*, 74 Cal., 287 (1887), it was held:

"A provision in a contract for the purchase of property at a valuation to be determined by the appraisement of third parties is not an agreement for a submission to arbitration; and in making their valuation the valuers are not subject to the rules which govern arbitrations, and may make their decision without being sworn, and without giving notice to the parties affected, or according them an opportunity to be heard, unless such notice and hearing be required by express provision or reasonable implication" (Syllabus).

In *Guild v. Railroad Co.*, 57 Kansas, 70 (1896), suit was brought to compel specific performance of a contract for the purchase and sale of lands at a price to be fixed by appraisers to be selected by the parties. After the appraisers named in accordance with the provisions of the contract had proceeded to make their valuation, the defendant undertook to revoke the authority of the appraisers, who in the contract were denominated "arbitrators." The court held that neither party had any right to retreat from or annul their agreement.

The court said:

"A question is presented whether they were arbitrators, or merely appraisers selected to value the property, and if the latter, whether the defendant could still revoke

their authority before the appraisement was actually made. An arbitration is properly a submission to the decision of one or more persons of a matter in controversy or dispute between the parties. The only matter these persons were called upon to decide was the value of the land, which according to the evidence, had not been discussed by the parties" (p. 78).

"The authorities recognize a distinction between appraisers of value or persons selected to make a measurement or computation under such a contract, and arbitrators properly so called" (p. 79).

"It would seem to be settled, under the authorities, that where there is an agreement for the purchase and sale of lands or chattels to be appraised by third parties, and such agreement is upon a valid consideration, and where the appraisement is rather an incident of the contract than a single subject of agreement between the parties, one party may not retain an advantage gained by the contract and revoke the authority of the appraisers. The English cases go so far as to hold that a court will remove obstacles placed by the vendor in the way of the appraisers in performing their duties, as held in *Morse v. Merest*, 6 Madd. 27, and *Smith v. Peters*, (L. R.), 20 Eq. cases, 511" (pp. 80, 81).

Wurster v. Armfield, 175 N. Y., 256 (1903), was a case where appraisers had been appointed, under a contract, to determine the rental on which a lease should be renewed. It was held that they were not statutory arbitrators, and were not therefore required to take the statutory oath, or give notice of their meetings, nor required to follow the ordinary course of judicial procedure, nor bound by the ordinary rules of evidence.

The court said:

"The appraisers took no oath of office, gave no notice of their meetings, and did not avail themselves of the testimony of any witnesses sworn before them as to the value of the property. In brief, they did not comply with the provisions of Sections 2365, 2368 and 2369 of the Code. But we are of the opinion that the appraisal in this case was not a submission of a controversy to arbitration within the meaning of those provisions, but instead, it was an appraisal made under the provisions of the contract for the purpose of fixing the amount that should be paid by the tenant and included in his contract" (p. 264).

In *Norwich Gas & Electric Co. v. The City of Norwich*, 76 Conn. 565 (1904), it was expressly held that commissioners appointed to appraise the value of works, on a purchase by the city, did not constitute a court within the constitutional provisions of Connecticut, and that its members were not judges, although its "functions were quasi judicial" (p. 571).

Apparently, the only deviation from this firm line of authorities is the case of *Earle v. Johnson*, 81 Minn. 472, where the plaintiff, one of the appraisers selected under a lease to value real property for the purpose of determining the ground rent, brought an action for slander against the party appointing him, who had publicly charged that his appointee had been bought by the other side. The court said that, under the Minnesota statute which declares that "a person chosen arbitrator"—among other officials—"who makes any promise or agreement to give a verdict, judgment, report, award or decision for or against

any party * * * is guilty of a misdemeanor," the charge in question was slanderous.

The court also said:

"A person acting in the capacity of the plaintiff as an appraiser under a lease, which requires a valuation to be fixed upon real property, is to all intents and purposes an arbitrator at common law. The proceeding is, in effect, a common law arbitration." (p. 533).

It is submitted that this language, used under peculiar circumstances, is so much at variance with the overwhelming weight of the decisions already cited, that it may be wholly disregarded as an authority on the general question under discussion.

POINT III.

The three engineers were, from the outset, regarded by the counsel for both parties, as constituting a board of appraisers and not a board of arbitrators, and by agreement of both parties were given the widest latitude of procedure.

1. Thus at the first public meeting of the board, on July 20, 1903, Mr. Wright, then the City Attorney, and still one of the city's counsel, presented a written statement on the part of the city, in which its attitude with regard to procedure under the appraisal was stated as follows:

“As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. *As to the method of arriving at the amount and condition of the property of the water company, the City of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter.* It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, to whose judgment the question of value must be submitted upon the examination of the property” (Record, p. 144).

In his subsequent remarks at the same meeting, Mr. Wright said:

“I have quoted from the statement and have presented to you the section of the ordinance under which the franchise was granted to the water company, which provided that the City of Omaha might purchase the works, and this section contains the only statement as to the method of the appraisal; and our idea of the matter is that this board be selected from engineers as provided in this section; that

their duties are not those to hear as a court, but being selected from experts upon the line of the appraised value of the property, it is contemplated under this law that the board shall make an examination for themselves of all the facts. * * * *We do not believe it obligatory upon them to proceed in any particular way, because it is not an arbitration board appointed by the court, to whom they must report, but are selected under agreement.*" (Printed record of appraisement, Exhibit 7 Z, p. 5; Record, p. 142.)

In his printed brief, submitted to the appraisers, at the conclusion of the testimony of the witnesses called by the parties, Mr. Wright said:

"It is important to know that the appraisement was not to be made by any one appointed as a referee by a court, nor by a board of arbitrators, who should report their findings to a court for its approval; but that the estimate was to be made by men having expert knowledge of the subject of the construction of water works and its cost. * * *

"The contract in question contemplates that this board, from an examination of the works themselves, and from such evidence as it may obtain in regard to the same, *whether taken under oath or otherwise*, as this board in its discretion may deem proper, shall make its estimate of value. It is entirely appropriate for the board to learn from reliable sources as to the property and works of the company which are not open to view; and also to take such opinions as to the value of those classes of property with which, as engineers, they have no particular expert knowledge. We conceive it to be perfectly proper for this board to enlighten itself by whatever means it may deem trustworthy, both as to the extent of the works, and the necessity or value of such parts

of the works as may have a peculiar relation to this plant or may depend upon local conditions, such as the value of real estate, the cost of erecting the buildings, and the character of the river protection" (pp. 4, 5, 6). (See Record, p. 134.)

In this view of the character of the board and the scope of its duties and powers, counsel for the water company concurred, and in addressing the appraisers made this statement, which was embodied later in a printed brief:

"While assuming responsibilities which are closely akin to those of judicial duties, the appraisers do not constitute a court. They have no power to compel the attendance of witnesses, or the evidence of witnesses, or the production of books and papers. Whether or not witnesses are sworn before them is, in a sense, immaterial. They are not bound by the testimony of witnesses for the company, or for the city. They can, from their own experience, accept what they will and disregard what they will. They can go outside of the oral testimony and outside of the printed record, or other record in the case, and seek for information where they choose. They can ask information from others, they may seek information from whatever source they deem useful for the purpose" (p. 24). See Record, p. 134.)

2. The board heard the explanation of the inventories submitted by the company, specially in description of features of the plant that were below ground and therefore not open to ordinary inspection. In compliance with the general custom where oral evidence is given, the witnesses were formally sworn, without objection from either

party. While the hearings were going on, the appraisers caused sections of the company's pipes to be taken from the streets, and made independent inspection of the company's works, the rip-rap on the Iowa shore, and the company's books, inspecting the property sometimes only with representatives of the city, and sometimes, it appears, by themselves alone (Record, pp. 148-155).

It is a mistake to say, as stated in the brief for the city, that with these hearings the case was closed. On the contrary, this statement was made by the chairman of the board on the last of these hearings:

"In closing this session of the board, which by common consent of the parties to this appraisal, is to be regarded as the last on which formal evidence is to be presented, and after receiving and listening to the able arguments of counsel, the matter of this appraisal has been formally handed to this board, the board wish to call the attention of the parties to this appraisal, to the fact that while much work had been already done, that the work of valuation of this board as a board has only just commenced. We have before us some thousand or more plats, diagrams, schedules, descriptive matter, some two thousand pages of evidence, and the arguments of counsel.

It becomes the duty of this board now to examine in detail these various schedules, to weigh the evidence presented, to examine the arguments which have been forwarded from this mass of matter, to arrange a schedule on which a valuation can be made by the board. It is undoubtedly evident to all who have followed closely these proceedings, that this will involve a considerable labor; *that undoubtedly much more information must be sought by the board than that already presented; and*

that the board will undoubtedly wish to call on the city and the company for special information as to details, the necessity for which will develop as the work proceeds.

In this connection I wish specially to call your attention to the fact that this is not a work of days or of weeks, but of months. While the board will undoubtedly take this matter up as expeditiously as possible, it must be recognized that the members of this board have other demands upon their time besides that of this appraisal, and I speak these words simply to make clear the fact that we recognize that no immediate report can be made, and that no such immediate report must be expected in this connection" (Record, pp. 147, 134).

3. The city and its representatives continued up to the day the report of the appraisers was delivered, to treat the proceeding as an appraisal and not an arbitration. Thus it appears from the record that the chairman of the water board was in continual communication with the appraiser selected by the city council, discussing the questions that were before the board, including values, and urged the appraiser to support the city's views, with no apparent thought of any necessity for the presence of representatives of the water company (Record, pp. 477, 481-3). It also appears from the evidence in the case, that other representatives of the city, including its counsel, were from time to time in the communication with the same appraiser in the absence of representatives of the company (Record, pp. 85-91, 153, 484).

Counsel for the city must have known, on the authority of cases cited in the city's brief, that such a course, proper in the case of an appraisal, might

be fatal to the whole proceeding, if that were an arbitration.

Moshier v. Shear, 102 Ill., 169.

Hewitt v. Village of Reed City, 124 Mich., 6.

So far from ever regarding the procedure of the appraisers as that of "a judicial body" as now claimed by counsel (Brief for City, p. 2), the city in its answer in the present case avers that "*they were without power or authority to swear witnesses or to take and receive evidence*", and characterizes their swearing witnesses as "a farce" (Record, p. 26).

It is noticeable that in the averments of the answer, charges are continually made against the two appraisers Benzenberg and Mead, in face of the undeniable fact that there was not a step taken nor anything done by the board except in the presence and with the participation and concurrence of the third appraiser, Alvord, up to the time of his dissent appended to the report at the last session of the board.

4. A careful examination of the numerous decisions cited by counsel for the city in support of the contention that it was improper for the appraisers to examine the company's books of accounts, except in presence of representatives of the city, shows that these decisions, except perhaps in a single instance, were made in cases of judicial arbitration, where the same strict rules were held to control the proceedings of the arbitrators and referees, which govern trials in the courts.

That possible exception, *Emery v. Owings*, 7 Gill, 405 (48 Am. Dec., 580), while the case of an appraisal of the cost of construction of a road, was treated as an arbitration (p. 497), and the award was held invalid on the ground that the arbitrators reached their conclusion solely through examination of the books of those who had built the road, without requiring or obtaining any further proof of the correctness of the charges, and without notice to the other parties, and in their absence. That was a case where the cost of the road had become really a matter of controversy and an issue to be tried by the arbitrators on evidence from both parties.

The cases of appraisals under insurance policies are in no essential respect parallel with the case under review. Those are virtually cases of arbitration of differences with respect to the value of property destroyed by fire, or damage to property in consequence of fire. With respect to such value or the loss and damage, evidence of the character of the property before it was destroyed or injured becomes essential to the appraisal. "Under such circumstances", as was said in *Continental Insurance Co. v. Garrett*, 125 Fed. 589 (p. 592), "appraisers should give notice to both parties of the time and place of hearing, and require evidence in respect of facts which they could not otherwise know."

In the present case, therefore, it cannot be held, either as matter of criticism upon principle, or as matter of defense under the proved facts and circumstances, that the position taken by the company and the procedure followed by the appraisers, and such use as the appraisers may have made

of the company's books, should invalidate or in any respect impair the appraisalment.

POINT IV.

Having failed to raise the objection that the examination of the books without the presence of its counsel would imperil the report, until after the appraisalment was completed, the city could not raise the objection then.

It was only for the purpose of attack upon the appraisalment that the claim was made by the city that the procedure of the appraisers was subject to the technical rules respecting arbitrations, and that therefore their examination of the company's books was a fatal error.

In the "appraisalment suit", numerous phases of the appraisal were set forth with regard to which it was averred that the appraisers were prone to error that would be fatal to a valid appraisalment. Nearly every conceivable peril from the city's point of view was anxiously drawn to the attention of the court, with a full prayer for interference (Record, pp. 386-91). Yet no instruction of the appraisers was asked in the line of judicial procedure in the inspection of the company's books, which had already been publicly declared to be open to their confidential examination for the sole purpose of the appraisal. No complaint was made touching the proffer and restriction thus declared on the part of the company; nor was anything said on the subject.

When the books were examined in February, 1906, the appraisement suit was still pending, and testimony was being taken in it as late as April 17, 1906, when proof was given of the first examination of the books immediately after they were offered for that purpose (Record, p. 658). Yet counsel for the city took no steps toward bringing the subject to the attention of the court and asking for a settlement of the question.

It was held in *Drew v. Drew*, 33 Eng. Law & Eq. N., that even where, in a strict arbitration, a party is justified in withdrawing because witnesses have been examined in his absence, yet, "if he continues, after the fact comes to his knowledge, to attend subsequent proceedings, this will be a waiver of the irregularity, and he cannot afterwards set aside the award on that ground."

POINT V.

The appraisement cannot be set aside, or deprived of full effect as an ascertainment of the purchase price of the company's system of water works, except on positive proof of corruption, partiality or actual misconduct.

As was said in *Republic of Colombia v. Cauca Co.*, 106 Fed., 337:

"The presumption is in favor of the award, and to avoid it the party complaining must clearly show that the authority granted has been exceeded" (p. 349).

And as was further said by the court, with reference to the allowance under consideration in that case:

“What that allowance should be was left for the commission to determine. All of the members heard the evidence and the argument, and two of them agreed to the allowance. Before this court can interfere and declare their findings invalid, it must be shown by the evidence that they acted corruptly, or that they made a gross mistake, or the same must be apparent on the face of the award. * * * The utmost good faith in the discharge of their duties will be presumed and the result reached by them will not be disturbed without clear proof of either corruption, partiality, or misconduct” (p. 351).

Also, as was said in *Brush v. Fisher*, 17 Mich., 469:

“Courts, however, favor awards made by tribunals of the parties’ own choosing and are reluctant to set them aside, and every presumption will be made in favor of their fairness, and the burden of proof is upon the party seeking to set them aside, and the proof must be clear and strong” (p. 473).

While the answer of the city in the present case alleges, in different paragraphs, that the award was “so grossly excessive that the same was and is fraudulent and void” (p. 26), and that by reason of the alleged “grossly wrongful and irregular procedure” of the appraisers in the examination of the company’s books, “the said estimate of value is fraudulent and void” (p. 27), and that the appraisers “Mead and Benzenberg, in a large measure, in arriving at their estimate of the value

of the works of the Omaha Water Company relied upon and acted upon the report of the bookkeeper chosen by them without authority of the City of Omaha, and without the representatives of the said city having any opportunity to know what said report showed; and that by reason of the premises, said estimate, award and report of said appraisers is fraudulent and void" (p. 27), and that because said appraisers "adopted an arbitrary method which resulted in a large and excessive valuation, the said estimate and report is fraudulent and void" (p. 28),—no evidence whatever was even offered to sustain as matter of fact any of these allegations.

There is absolutely no proof in the case of any wrongdoing on the part of the concurring appraisers, or of any harm done to the city.

POINT VI.

The terms of the contract reserving to the City of Omaha the right to purchase the water works necessarily authorized a valuation by a majority of the Board of Appraisers.

1. The distinction between an appraisement in a matter of entirely private interest and an appraisement in a matter of public concern is obvious and conclusive.

Where the matter affects only those who are parties to the submission, the rule is well established that all the appraisers to whom the matter is sub-

mitted must unite for the purpose of a valid and binding determination, unless an express provision to the contrary be contained in the agreement of submission. In that case the parties are bound by the literal terms of the submission, and whether the submission results in a determination or a failure is wholly their private affair. Any failure of result leaves the parties still free to contract with regard to the subject matter of the appraisalment, or to resort to the courts for an adjudication, where there is a controversy.

Where, on the other hand, the appraisalment is a matter which concerns any considerable number of persons other than the immediate parties, interests are involved which failure of the appraisalment may irretrievably imperil. For then the persons whose interests are thus affected will not have such privity as will enable them either to institute or continue negotiations regarding the subject matter of the appraisalment, nor will they have any standing in court for the enforcement of a judicial determination of the controversy.

As was said by this Court in *Colombia v. Cauca Co.*, 190 U. S., 524, 528,

“In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demand.”

No better illustration of this vital distinction can be found than in the case now before the Court. As stated in the city's petition for the writ of certiorari, the purchase by the City of Omaha of the system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence involves “matters of great public interest and importance to the 175,000

people living in said cities and towns, and questions which to many of said citizens are of grave and serious concern" (Petition, p. 1).

It appears from the printed record that it was the belief of the chairman of the water board of the City of Omaha that nine-tenths of the people of that city wanted to buy the entire works (Record, p. 659).

Yet, if the appraisement under review be held invalid for the want of concurrence of the three appraisers, none of these people, except members of the water board, *acting by a majority of their number*, will be in a position to put in motion a new appraisement or negotiate with a view to the completion of the purchase the people desire, or have any standing in court to compel the water company to complete the sale of its water works to the city.

It seems a juggling with words for counsel for the City of Omaha to base their application to this Court for the writ of certiorari on the ground that the purchase of the water works is a matter of great public interest, and yet argue here that such purchase is not a matter of public concern.

2. It is, however, too clear for extended discussion that the acquisition by the City of Omaha of a system of water works is emphatically a matter of public concern.

It is equally so, whether the acquisition be considered an undertaking in the exercise of the strictly business powers of the city, or in the exercise of its municipal authority. On the business side it is a matter of concern to all the taxpayers by reason of their essential interest in the methods of providing for payment. On the other side it

is the intimate concern of all citizens, because of their interest in a water supply for domestic and mechanical uses and for the safeguarding of the public health and the protection of property from fire.

In this particular case, moreover, the purchase has been virtually commanded by an act of the legislature, which provided for the declaration by ordinance, that it was both necessary and expedient for the City of Omaha to construct or purchase a system of water works, authorized the creation of a water board to have charge of the operation of such system, enacted provisions for the protection of the water plant, provided for the levying of a water tax for the purpose of paying interest on any water bonds issued by the city in payment for the works, as well as the cost of operation, maintenance, extension and improvement of the plant, and declared that the act should be of full force and effect from and after its passage and approval, by reason of an existing emergency.

Act of 1903, Sections 1, 3, 4, 5, 6, 10, 12, 14, 18 and 22 (Appendix to this Brief).

The public character of the acquisition of the water works system in question is equally and specifically recognized by the Act of 1905 (Appendix to this Brief).

Apart from these express statutory provisions, it must be held that the acquisition of this system of water works, under the option reserved by the ordinance of 1880, is necessarily a matter of public concern.

As said in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, "that the supply of water to a city is a public purpose cannot be doubted" (p. 689).

In *Wagner v. City of Rockland*, 146 Ill, 139, the court held:

"The business of furnishing the inhabitants of a city with water by means of water works so constructed as to bring the water from some permanent source of supply and distribute it by means of pipes laid in the streets to the residences and places of business of those desiring to obtain their water supply in that manner, though not an exercise of the power of sovereignty, is undoubtedly a business which is public in its nature, and belongs to that class of occupations upon which a public interest is impressed" (pp. 153-154).

Directly relevant is the decision in *Minneapolis Mill Co. v. Board of Water Commissioners of St. Paul*, 56 Minn. 485..

In that case the legislature of Minnesota had authorized the City of St. Paul to purchase the water works of a private corporation theretofore engaged in supplying the city with water. A board of water commissioners was created by the same act and, as a branch of the city government, took charge of the water works after their purchase. The plaintiff, owner of mill rights on the Mississippi River, sought to enjoin this board from taking water for the city from a lake which fed a stream flowing into the Mississippi above the location of the plaintiff's dams. The orders dismissing the complaint were affirmed.

The court, in the course of the opinion, said:

"The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use

of cities in their vicinity is such a public use and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the city, through boards of commissioners, or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them, as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city water works, does not affect the real character of the use, or deprive it of its public nature" (p. 490).

See also:

Winters v. City of Duluth, 84 N. W. 788, 82 Minn. 127;
Eau Clair Water Co. v. City of Eau Clair, 132 Wis. 411.

That this is necessarily so follows from ancient decisions, applied within our time beyond what is necessary in the present case. It was said by Lord Chief Justice Hale, more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg., Law Tracts, 78, that when private property is "affected with a public interest, it ceases to be *juris privati* only."

As declared by this Court in *Munn v. Illinois*, 94 U. S., 113, "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large" (p. 126).

See also

Budd v. New York, 143 U. S. 517;
Slingerland v. Newark, 54 N. J. L.,
 62;
*Kennebec Water District v. Water-
 ville*, 96 Me., 234.

3. Public policy therefore requires that in a matter of public concern the determination of a majority of the appraisers, where all meet to consider the matter, must be taken as the act of the whole. This rule is quite as firmly settled as the contrary rule with regard to appraisements in merely private matters, and was laid down long ago in *Grindley v. Barker*, 1 Bos. & Pul. 229, when Eyre, Ch. J. said:

“I think it is now pretty well established, that where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.”

The rule is plainly stated in *McCoy v. Curtice*, 9 Wend. 17, as follows:

“Where power is delegated to two or more individuals for a mere private purpose, in no respect affecting the public, it is necessary that all should join in the execution of it. Thus arbitrators must all unite in an award. But in matters of public concern, if all are present, a majority can act, and their acts will be the acts of the whole” (p. 19).

This language is adopted in *Cowan v. Murch*, 97 Tenn., 590, 598, and *Carroll v. Alsup*, 107 Tenn., 257, 271.

Directly in point is the case of *People ex rel Washington v. Nichols*, 52 N. Y. 478.

In that case the price to be paid by the State of New York for certain relics of George Washington was "to be paid only upon the certificate of Martin Grover and the Chancellor of the University and J. Carson Brevoort, that the said relics are, in their opinion, genuine; and that it is desirable, in their judgment, that they should be placed in the Museum of the State Library."

Two of the three persons named certified that the relics thus referred to were, in their opinion, genuine, and that it was desirable, in their judgment, that they should be placed in the Museum of the State Library; stating however, that they thus certified "without the concurrence of their associate."

The validity of the certificate was upheld by the court, which said:

"By the well settled rule at common law, this power would have been legally exercised by the signature of two of the three to the certificate when all three had assembled to pass upon the question" (p. 481).

Citing *Green v. Miller*, 6 J. R., 39 and *Ex parte Rogers*, 7 Cow., 526, 529, the court further observed:

"In the case at bar the legislature desired to purchase, upon certain terms, what they regarded as of interest and value to the public. It was a question between an individual and the State. This would seem, then, to be plainly a matter of public concern. This certificate, therefore would have been legally given at common law when signed by a majority" (p. 482).

Young v. Buckingham, 5 Ohio 485, was a case of appraisement under a statute providing for the erection of a toll bridge, and the acquisition of land for the purpose, to be valued by three commissioners. An appraisement by two of the three was upheld, and the Court said:

“The statute requires that the land shall be valued by three freeholders and the assessment paid, before it can be taken for the bridge. The proceedings of the court show the valuation made and the amount tendered, but that, although all the appraisers were present and acting, two only united in the appraisement. It is objected that the dissent of one invalidates the appraisal, for it is insisted that a strict execution of powers must be shown.

The determination of this point depends upon the nature of the powers to be executed by the commissioners. In the execution of a power delegated for purposes merely private, it is necessary that all should concur in the act, as in the case of trustees, arbitrators, etc. But if the persons be entrusted with powers *in some respects of a general nature, or for public objects*, if all are acting, a majority will conclude the minority and their act is the act of the whole. Co. Lit., 181; 1 B. and P., 228; 6 Johns., R., 39. It is evident that this power was confided to these commissioners for public objects, since the taking of the land from McIntyre can be justified upon no other ground than that it was demanded by public interest” (p. 489).

Colombia v. Cauca Co., 190 U. S., 524, is a decision clearly applicable to the case now before this Court.

Growing out of a controversy between the Republic of Colombia and the Cauca Company, which

had partly built a railroad of which that government claimed a forfeiture, an agreement was made, the essential features of which were that the company surrendered the railroad and that Colombia agreed to pay a just indemnity to be determined by a commission of three—one appointed on behalf of Colombia, one on behalf of the company, and the third by agreement between the Secretary of State of the United States and the Colombian Minister at Washington. The commission was, by the terms of the agreement, authorized to "determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and as to the proceedings of the parties." In pursuance of this power, it resolved that all decisions should be by a majority vote.

After all the testimony had been taken, and all the matters in controversy had been argued by the parties and considered by the commission, and a final vote thereon was about to be taken, and after a number of the items of the award had been agreed upon, some unanimously and some by a majority vote, the member of the commission appointed by the Colombian government wrote a letter to his government resigning his position, delivered a copy of such letter to his colleagues and refused to take any further part in the proceedings. Thereupon, an award was made on the same day by the concurring votes of the other members.

The Republic of Colombia brought a suit in equity for a cancellation of the award, on the ground that it had been concurred in by only two of the three arbitrators. The defendant interposed a cross bill to establish the award as valid,

notwithstanding the withdrawal of the representative named by the plaintiff. The decree of the Circuit Court confirmed the award, after rejecting certain items (106 Fed. R., 337). This decree was affirmed by the Circuit Court of Appeals on the opinion below (113 Fed. R., 1020), and this decree of affirmance was sustained by this Court.

This Court said:

“The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as a result of, diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign state and a railroad, declared by a law of Colombia to be a work of public utility. *In short, it was dealing with matters of public concern.* It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. *Obviously that was the only way, as each party appointed a representative of its side.* We are satisfied that an award by a majority was sufficient and effective. We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed” (p. 528).

Gas Co. v. Wheeling, 8 W. Va., 320, was a case precisely parallel to the case that is now before the Court, except that there, upon failure of the parties to agree upon a price, there was an arbitration of the difference, and that there it was the company, not the city, which contended that the appraisement was invalid for want of concurrence by all three appraisers.

It was provided in the act of the General Assembly of Virginia, incorporating the Wheeling Gas Company, that, upon the expiration of twenty years from the time of the grant to the company of the privilege of using the streets, alleys and public ground of the city of Wheeling, for the purpose of lighting the city with gas for the term of thirty years, the city should have the right, at the discretion of the city council, to purchase the works of the company at a price to be agreed upon between the city council and the directors of the company, "or to be fixed, ascertained and determined in the following manner: By the award, in writing, of three persons to be chosen, the first by the directors of said company, the second by the council of said city, and the third by the two thus chosen." It was further provided that the appraisers, in making up their award and ascertaining the value of the property, should not consider the value of the franchises of the charter, or the dividends or profits arising to the stockholders.

Upon the expiration of the twenty years, the city gave notice of its intention to purchase, and, upon a failure of the parties to agree upon the price, three persons were chosen, according to the act, to fix, ascertain and determine the price.

These three persons jointly heard, received and considered the allegations made and the evidence produced before them touching the matters submitted, and at length two of them made their written award, in which, after reciting the preliminary proceedings, they go on to say:

"Having heard, examined and duly considered the allegations, vouchers and proofs and witnesses of the said parties respectively (B. M. Eoff being at all times present dur-

ing all examinations and deliberations and also present at the making of this our award), we, the said John McLure and Robert B. Woods do make and publish this our award in writing of and concerning the matters referred to or devolving upon us by the provisions of the seventeenth section of the Act of the General Assembly of Virginia, entitled 'An Act to incorporate the Wheeling Gas Company,' passed March 18, 1850, as follows, that is to say: With respect to the present actual value in money of the lots or grounds, works, apparatus, fixtures, and property of said gas company: We, the said John McLure and Robt B. Woods, do award, adjudge and ascertain the value to be the sum of seventy-three thousand and six hundred and thirty-seven dollars and fifty cents (\$73,637.50). And with respect to the price and the terms upon which the said city of Wheeling shall become the purchaser of the lots or grounds, works, apparatus, fixtures and property of the said Wheeling Gas Company, we, the said Jno. McLure and Robt. B. Woods, do award, fix and ascertain and determine that the said City of Wheeling shall become the purchaser of the said lots or grounds, works, apparatus, fixtures and property of the said Wheeling Gas Company, upon its paying or causing to be paid to the said Gas Company, on or before the 30th day of June, 1871, the sum of \$73,637.50. In witness whereof we have hereto set our hands, this the 29th day of May, 1871.

ROBT. B. WOODS,
JNO. McLURE."

Below appeared: "I dissent from the above.
May 29, 1871, B. M. Eoff."

The City of Wheeling, by its gas commissioners, previously authorized, thereafter tendered the specified price to the officers of the gas com-

pany, who refused to receive the same. The city, then, by its commissioners, deposited the money in the bank, subject to the order of the company, and took possession of the company's works.

Some time after, the company brought an action of ejectment against the city to recover the property. After a demurrer by the city had been overruled, the cause was tried before a jury, and the jury found for the defendant, and a judgment was rendered accordingly, which, on appeal to the Supreme Court of Appeals of West Virginia, heard by three judges, was sustained, in accordance with their unanimous opinion.

The chief contention on the part of the company was, that the instrument of writing, dated May 29, 1871, purporting to be an award, was not valid and binding, because it was the award of only two of three appraisers.

The court held that, from the provisions and manifest objects of the legislative act under which the company was incorporated, it was the intention that the city council should have the absolute right to purchase the property of the company, and that, in the event the council should elect to make the purchase and should fail to agree with the directors of the company on the price, the price *should* be fixed, ascertained and determined *at all events* by an award of the appraisers, and that the remedy given by appraisal *should* be complete, effective and reasonably expeditious. Consequently it was held not to be essential to the validity of the award that more than a majority of the appraisers should agree to and sign the same, where all acted jointly, but that the price should be determined by this appraisal, and that the purchase and possession of

the property by the city should be complete upon its complying with the terms of the appraisal so made.

In passing upon this branch of the case the court said:

“It would be a discreditable reflection upon the wisdom and foresight of the legislature to suppose that it had given the council of the city an absolute right to purchase the gas works, property, etc., in their discretion, at their reasonable value, excluding the value of the franchise of the charter and the dividends or profits accruing to the stockholders, and had provided specifically but two modes or remedies by which the price and terms of the purchase were to be fixed, ascertained and determined, neither of which was reasonably certain, *and either of which could easily be defeated by the act of the plaintiff*” (p. 358).

“When we consider the object and purpose of the legislature, as well as its importance, in authorizing an absolute right of purchase of plaintiff's gas works and property, as provided in said seventeenth section, it seems to me to so construe that section as to require all three of the arbitrators to sign the award fixing the price and terms of purchase, to make it valid, would be absurd and unreasonable, and would defeat the object of the section. For these reasons, I consider and am of the opinion that said instrument of writing, bearing date the 29th day of May, 1871, purporting to be an award, is within the provisions of the said seventeenth section of the Act of the General Assembly of Virginia, incorporating the plaintiff, and that it is a valid award” (pp. 359-360).

The reasoning here applied with respect to a provision for purchase in a legislative act cer-

tainly applies with equal force to the construction of the purchase clause of the Omaha ordinance of 1880, itself a legislative act.

See *St. Paul Gas Light Co. v. St. Paul*, 181 U. S., 142.

While the West Virginia court was content to rest its decision strictly upon the grounds already stated, it also discussed the question of the validity of the appraisement concurred in by two of the three appraisers, in respect to the purchase as a matter of public concern.

At the time that decision was rendered, the law of *quasi* public corporations had not been developed to the extent to which it has since been established by repeated decisions of the courts, which make it clear that the acquisition by municipal corporations of gas works and water works is nothing less than a matter of public concern.

As the law on this subject now stands, as declared by the authorities already cited, the reasoning of the West Virginia court, and the authorities cited by that court, are not only directly applicable, but absolutely conclusive in the present case.

In the course of a lengthy opinion the court said:

"In the case of *Eames v. Eames*, 41 N. Hamp. 177, Fowler, Judge, in delivering the opinion of the court, says, on page 181: 'It is well settled that when a submission, by parol or in writing, is made by private parties to a given number of persons, without any express authority, given or to be inferred from the manner or circumstances of the submission, that a smaller number may decide, an award or decision will be

void unless made by all; *though a different rule prevails where authority is confided to several persons in matters of public concern.*' A part of the syllabus of the case is in the language of the Judge, see page 177. In the case of *Green v. Miller*, 6 Johns. (N. Y.), 39, the syllabus is 'where an authority is confided to several persons for a private purpose, all must join in the act; *aliter in matters of public concern.*' And Judge Thompson, in delivering the opinion of the court, in the case from which the syllabus is taken, says: 'I am, however, satisfied that as a submission to arbitration is a delegation for a mere private purpose, it is necessary that all the arbitrators should concur, unless it is otherwise provided by the parties. *In matters of public concern a different rule seems to prevail.*'

"In the case of *Patterson v. Leavitt*, 4 Conn., 50, the Chief Justice in delivering the opinion of the court, says: '*If a power be of a public nature, the majority may perform the act delegated, the power being considered joint and several*' " (pp. 352, 3).

The legislature, in authorising the purchase, evidently contemplated that the city would use said gas works, etc., in the manufacture and furnishing gas for the consumption of the inhabitants, and for lighting the public buildings, streets, alleys and public grounds within the city for the benefit of the inhabitants thereof—in other words, the public—and *that the money with which the purchase should be made should be raised or paid, ultimately, by taxes, imposed by the city on the corporations thereof.* The authority to purchase was evidently given for the benefit of the municipality in the course of its municipal business or duties. In other words, the city was acting in its capacity as agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of

Wheeling. * * * It seems to me, all things considered, that in some respects the purchase of the said gas works, etc., was authorized for a public purpose, and that the public interest was and is concerned to some material extent therein and in the making of said award. * * * *Under the views I have advanced the public has some interest, and was and is concerned, to some extent, in said purchase and award, and if that is correct, then, according to some of the authorities I have cited, the award agreed to and signed in this case by two of the arbitrators is valid, although the third arbitrator dissented*" (pp. 355-6).

4. Both on the ground upon which the decision in the West Virginia case was based and the ground set forth with such logical conclusiveness, the appraisement in the present case must be sustained.

Here, as there, it was unquestionably the purpose of the ordinance of 1880 that, in the event of a forfeiture of the water works, under Section 11, or a purchase under Section 14, the city should, beyond peradventure, "become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith" (Record, p. 685).

The acquisition of such property, whether through forfeiture or purchase, was made subject to the payment of a just compensation therefor, to be ascertained by an appraisement, as provided in section 14, of the ordinance.

It could not have been within the contemplation of the city council that a forfeiture or purchase could be defeated by either the withdrawal or non-

concurrence of the engineer appointed by the water works company. Nor could it have been within the contemplation of Locke that an ordinance of purchase, duly adopted by the city council and approved by the mayor, could be virtually repealed by the withdrawal or non-concurrence of the engineer selected by the city council.

When the act of 1903 made it the duty of the mayor and council to declare by ordinance that it was necessary and expedient for the city to construct or purchase, as the case might be, a system of water works, and, in case of a purchase, to take the necessary steps to acquire such water plant, either under the powers granted by the charter of the city, or by virtue of any rights enuring to the city through contract, it must have been the intent of the legislature to provide for resort to a sure method of acquisition.

In choosing to acquire the system of water works operated by the Omaha Water Company by virtue of the right reserved in the ordinance of 1880, instead of resorting to condemnation proceedings, the mayor and the council committed the city irrevocably to a purchase under the terms of the ordinance, subject only to the ascertainment of the price by an appraisement.

It is inconceivable that such a contract of purchase can be rendered nugatory by the mere withdrawal or non-concurrence of the appraiser appointed by either party. Such a possibility would involve the incidental delegation to each of these appraisers of a power greater than the party appointing such appraiser could wield, and a power sufficient to defeat the will of both of the contracting parties.

The circumstances of this case not only show that such a result could not have been within the contemplation of the parties, but also demonstrate the reason of the established rule that, in matters of public concern, the determination of a majority of a board of appraisers must prevail.

5. If the contrary were to be held in a case like this, then the city might, through the withdrawal or non-concurrence of its engineer at the end of the case, ascertain the extent and value of the company's property, and then avail itself of choice between completing or refusing to complete a purchase.

This would be an obvious avoidance of the clear intention and logical consequence of an exercise of the option provided for in section 14 of Ordinance 423. But if this end could not lawfully be reached by direct means, it obviously could not be accomplished indirectly.

The right of a city to do this was tested in *Montgomery Gas Light Co. v. The City Council of Montgomery*, 87 Ala., 245.

The contract there was similar to the Omaha contract and contained a stipulation that, at the expiration of twenty-five years from November 1, 1852, the city should have the right to buy the gas plant "at such price as may be ascertained and determined by five disinterested men, two of whom shall be chosen by the city council of Montgomery, two by said John Jeffrey & Co. * * and the fifth by the four thus chosen."

At the end of the twenty-five years, the city council, seeking to avail itself of this option and "with a view to purchasing" the gas plant, appointed two men to act as appraisers and notified the company to appoint two others. The com-

pany refused to appoint, on the ground that the city, while it had the right to purchase the property, did not have the right to an appraisal merely with a view to purchase. Thereupon the city gave the company notice that the contract was at an end, and proceeded to arrange a contract with another company, to prevent which suit was brought.

The Supreme Court of Alabama held that the city had no right to a tentative appraisalment; that the city's construction of the contract would have compelled the company to sell its property at the assessment of the appraisers, whereas the city would not have been compelled to buy it on that basis against its will; and that such a construction would produce an unequal status of parties, which could not have been contemplated by the contract.

The court said that the city could have made a preliminary investigation on its own account without expense to the company, before having any appraisers appointed under the contract, and need not have called for the formal appraisal without a fairly accurate knowledge of what the city would eventually be bound to pay for the plant.

The court also said:

"The offer implied that the seller took the chances of a fair valuation by appraisers. The acceptance to be responsive must assume the same uncertainty on the part of the purchaser. To accept upon the condition that the appraisers shall first determine upon a price the acceptor is willing to pay, is manifestly not only no acceptance at all, but is an affirmative rejection of the offer" (p. 255).

6. All the conditions of a valid appraisalment through the concurrence of two of the three appraisers are shown by the evidence to exist in this case.

Mr. Alvord, the engineer selected by the city, joined with Mr. Benzenberg, the engineer selected by the company, in the selection of Mr. Mead as the third engineer, to complete the number of appraisers (Record, pp. 161-2).

Mr. Alvord was present and acted with the other appraisers at the first meeting of the board of appraisers, when it organized with the appointment of Mr. Mead as chairman and Mr. Alvord as secretary (Record, p. 161).

Mr. Alvord sat with the appraisers at the City Hall in Omaha at all the sessions during which the inventory, in the form of maps and plans, with explanations, was submitted to the board, and heard the statements made on behalf of the company and on behalf of the city (Record, pp. 133, 142-3).

Mr. Alvord joined with the other appraisers in selecting localities for the removal of sections of the company's pipe-line system, for the purpose of determining the character and extent of depreciation of the pipe (Record, p. 145).

Mr. Alvord, with the other appraisers, visited the company's works and property in Omaha and at Florence, South Omaha and elsewhere, and inspected the river protection on the Iowa bank, as well as at Florence (Record, pp. 144-147).

Mr. Alvord had every opportunity which the other appraisers had of examining the company's property and books and considering the elements of valuation, and, as matter of fact, availed him-

self, equally with the other appraisers, of all these opportunities (Record, pp. 95 658).

It can not be denied that Mr. Alvord was present with the other appraisers at every meeting of the appraisers, wherever held (Record, p. 133).

Mr. Alvord was not only present with the other appraisers at the last meeting of the appraisers, when the report was agreed upon and signed, but at the same time appended his non-concurrence at the end of that report (Record, p. 165).

The conclusion then reached was arrived at after months of investigation, involving an expense to the city of large sums of money and an expense to the company of vastly larger sums—about \$27,000., besides legal expenses—in the preparation and submission of the case (Record, p. 130).

The work of all the appraisers continued after the matter had been argued at length before all the appraisers by counsel of both parties; also after the court on application of the city had given the appraisers all the instruction deemed advisable on a submission of all the questions claimed by the city to be involved in the appraisement.

As in the West Virginia case, there was a mere declaration of non-concurrence in the report and in the valuations reported.

It must be assumed that Mr. Alvord, as an engineer of reputation in his profession, undertook to render to the city, for the compensation paid him from the city treasury, honest and valuable service in the appraisal of the true valuation of the system of water works operated by the Omaha Water Company. Both the city

and the company were entitled, under the terms of his employment, to have the benefit of his services in making the appraisal. It cannot be that the terms of his employment were satisfied, or that the service due the city was fulfilled, by his merely attempting to block and defeat the appraisal at the finish. It cannot be held that he acted fairly either to the city or to the company in a mere non-concurrence with the other appraisers, without specification of his own estimate, or of the difference between the other appraisers and himself. Having acted with the other appraisers throughout, he must, therefore, be presumed to have taken part in their deliberations, as well as their examinations, and to have given them the benefit of his experience, views and judgment, and to have made with them actual estimates of the value of the properties, which in gross and in detail the appraisers were required, by the terms of their appointment and under the instruction of the court, to estimate.

The failure of Mr. Alvord to state, and the failure of the city to prove, what the difference was between the valuation of the other appraisers and his valuation, necessarily leave their estimate unaffected by his non-concurrence. The conclusion is inevitable that the difference between them was comparatively slight, or it certainly would have been either expressed by Mr. Alvord, or proved in this case by the city.

There is no evidence in the case upon which the courts below could have found that the estimate ascertained and reported by the two appraisers was not virtually Mr. Alvord's estimate as well; or could have found that there was any material

difference between the two estimates, or could have found in the estimate stated in the report any infirmity of valuation as matter of fact, or invalidity of appraisal as matter of law, by reason of Mr. Alvord's non-concurrence.

In view of the course of the appraisement as disclosed by the evidence, and of Mr. Alvord's action throughout the appraisement, and his attitude at the last, the language of the judge at Circuit, in the opinion in *Republic of Colombia v. Cauca Co.* (106 Fed., 337), adopted by the Circuit Court of Appeals (113 Fed., 1020), may be applied, in large measure at least, in the present case.

The court there said:

"Clearly, it was not the intention of the parties to the convention that the existence of the commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. *It would be an impeachment of the common honesty of the parties to the agreement, and a travesty of their evidently honorable intentions, to hold that they designed it should thus be in the power of one man to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research.*"

7. There is no warrant in the case for the statement by counsel for the city that the contract of purchase "by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that theory until the moment when it was finally determined that the three appraisers could not agree" (Brief, p. 9), or the statement that "the appraisers, from the begin-

ning of their proceedings, July 20, 1903, as well as the representatives of the respective parties, acted upon the theory that it would be necessary for the three appraisers to agree upon the valuation to be fixed upon the water works" (Brief, p. 21).

No one questions that it was the duty of all three appraisers to meet together and to "confer and act together." That is what they were selected to do, and were paid for doing. But it no more follows that they were bound to unite in their estimate than that unanimity is essential to a determination by any other board charged with duties of public moment.

Diametrically opposed to the statements of counsel for the city is the view of the facts taken by the Circuit Court of Appeals:

"It is not improper to observe that until the report was made the three appraisers were regarded by all parties as composing a board or body invested with powers in their aggregate capacity. Immediately upon their selection they organized as a 'Board of Appraisers' by the election of one of their number as chairman and another as secretary, and thereafter they constantly referred to themselves as a board. They were so addressed by counsel for the city when he outlined a method of procedure for their adoption. While the appraisal was in progress, the water board and the city filed a bill in the Circuit Court against the appraisers and the company to secure authoritative directions as to the appraisal. In this bill of complainants, in the answer of the company and in the decretal order of the court, there is constant reference to them as 'the board' and the 'board of appraisers.' The popular conception of a board is that, like tribunals in general, it acts as a

unit and speaks through a majority of its members."

Omaha Water Co. v. City of Omaha,
162 Fed. 225, pp. 229, 230.

This view of the facts is amply supported by the evidence in the case. (Record, pp. 143, 144, 147, 157, 159, 161, 162-165, 170, 185, 186, 370-391, 405-417, 502).

8. None of the decisions cited by counsel for the city in support of the contention that the report was void because not concurred in by the three appraisers, is in conflict with the undeviating line of authority that unanimity in final determination is not necessary in matters of public concern. Not only is there no decision presented to the contrary, but in many of the cases cited the distinction is expressly recognized and stated.

See *Patterson v. Leavitt*, 4 Conn.
50;

Harryman v. Harryman, 43 Md. 140;

Lowe v. Brown, 22 Ohio St. 463;

Hubbard v. Great Falls Mfg. Co., 80
Me. 89;

Weaver v. Powell, 148 Pa. St. 372;

Cortis v. Kent Water Works Co., 7
B. C. 314.

9. There is no inconsistency as regards this question in the decisions of the Circuit Court of Appeals in the earlier case of *Omaha Water Company v. City of Omaha*, 147 Fed., 1, and in the present case of the *Omaha Water Company v. City of Omaha*, 162 Fed. 225. While it is true that that court in the earlier case held that "in contracting

for the construction or purchase of water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative, but is using its business or proprietary, powers," it did not hold in that case that the ordinance containing such a contract was a matter of private contract as distinct from one of public concern. Nor did that court hold in the present case that such a contract "is a public contract and of a public nature as distinct from a contract between individuals or private corporations" (Brief on Petition for Certiorari, p. 14), but the court did say that "It has never been held, and never can be with reason, that a contract between a water company and a city for the acquisition by the latter of a system of water works, is not a matter of public concern" (162 Fed., p. 231).

10. Nowhere has it been held that, in order to sustain an appraisalment by a majority of a board of appraisers or any other board in a matter of public concern, it is necessary that the members of such board be public officers, or invested with authority through national or international arrangement, or be clothed with authority by statute.

While it is true that in the present case the ordinance of 1880, providing for the appraisalment, was virtually a legislative act, under delegated authority, as has been repeatedly held where impairment of a contract has resulted from the terms of a city ordinance (181 U. S. 142), neither such character of the ordinance, nor the public purpose for which the purchase provided for was to be made, was essential to the application of the majority rule. Because of the underlying reason of the rule, it was sufficient that the

purchase in question be merely a "matter of public concern," or, as said in *Grindley v. Barker*, 1 Bos. & Pul. 229, be "in some respects of a general nature"; unanimity being required only, as held in *McCoy v. Curtice*, 9 Wend. 17, "where power is delegated to two or more individuals for a mere private purpose in no respect affecting the public."

By no means all of the cases in which the majority rule has been applied were of governmental character. Thus, in *Crooker v. Crane*, 21 Wend., 211, the board which the court held could act by a majority was a board of commissioners to receive subscriptions to the capital stock of a railroad company. The incorporation of the company by a special act of the legislature gave it no higher character than if it had been incorporated under a general law. It was not a governmental agency for any purpose, but the public had an interest in the proper allotment and distribution of its capital stock.

Neither in that case nor in the *Wheeling Gas Case* was there determined "a matter arising only under a *public law*," in the sense claimed for it by counsel for the city (Brief, p. 23), although the Supreme Court of West Virginia has held, in conflict with the Supreme Court of North Carolina and the Court of Errors and Appeals of New Jersey, that an act incorporating a private corporation is a public act.

State v. B. & O. R. R., 15 W. Va., 392 (1879).

Durham v. Railroad, 108 N. C., 399 (1891).

Perdicaris v. Trenton City Bridge Co., 29 N. J. L. 367 (1862).

11. It follows that where a city has, by exercise of such a reserved right as that contained in Section 14 of Ordinance No. 423, become bound by an irrevocable contract of purchase, the right of either party to a completion of the purchase cannot be either defeated or impaired through the action of a single appraiser, any more than by the action of one of the parties to the contract.

Therefore, upon all grounds, the estimate stated in the report, signed by two of the three engineers constituting the board of appraisers, must, as matter of law, following the language of the court in *Grindley v. Barker*, be considered as "the act of the whole."

POINT VII.

The going value of the company's system of water works, as distinguished from the unexpired franchise, is an integral and essential element of the appraised valuation of the property.

While the inclusion of the going value in the appraisalment is not assigned as error in the petition for the writ of certiorari, nor claimed in the brief in support of the petition to have been erroneous, the question is now raised by counsel for the city (Brief, p. 60). Without any concession that the question is properly before this Court for review, it will nevertheless now be discussed.

1. In the order made in the appraisalment suit, November 29, 1905, it was, among other things,

ordered that if the appraisers, acting as a board of appraisers, should find that the water company had "a going value as distinguished from the unexpired franchise" they should separately state and report the amount thereof as a distinct and separate item of valuation, both with respect to the entire property and with respect to the property exclusive of the portion of the water plant in South Omaha, Dundee, East Omaha and of the distribution mains in Florence (Record, p. 504).

In the transactions of the American Society of Civil Engineers, No. 813, there is a discussion of the method of determining the going value, with special reference to the case of the Kansas City Water Works, by Mr. Moore, one of the appraisers in that case, concluding as follows:

"In the Kansas City case, as in most similar cases, the franchise had expired, and the city had refused to renew it. The company had therefore no right to continue the business at all. The one thing to be valued was the property in working order with the private attachments all made, and a body of patrons ready to take water. The value of all this was the amount of money it would have cost the city at the time of the transfer to replace the property in the same condition in which it was actually found.

The problem of valuation in this and like cases involves, therefore, as already intimated, a consummation of the following elements:

First.—A valuation of the real estate owned and occupied.

Second.—An estimate of the amount of money necessary to replace the plant, including buildings, reservoirs, machinery, pipes, etc., in its present physical condition, exclusive of interest.

Third.—Interest on this amount during the time which would ordinarily and reasonably be required for construction.

Fourth.—A further allowance of interest for such additional time as would probably be required to work up the business to the same standard as that found at the time of the transfer.

These estimates and allowances should all be made upon a fair and reasonable, or even liberal, basis; but when so made, everything has been done which either justice or equity requires."

(Vol. XXXVIII, p. 151, December, 1897.)

The maps and inventories furnished the appraisers by the company necessarily included not only all the public hydrants, but all the private attachments of the system. The appraisers were therefore in possession of all the facts needed for a proper estimate of the going value of both portions of the system, without resort to the company's books of account.

Following the instructions of the order, the appraisers separately appraised the going value of these portions, and separately stated the going value of each in their report (Record, p. 165). As there was no effort made in the case to impeach the method employed or the amounts arrived at with respect to these estimates of going value, the only question to be considered, if it can be considered in this case, is whether or not the appraisers were justified in including any going value in their appraisalment.

2. Under the reasoning and authority of the leading decisions upon this subject, there can be

no reasonable question that the estimate of the valuation of these water works for the purpose of their purchase by the city properly included an estimate of their going value.

While, by the terms of Ordinance 423, it is expressly provided that nothing shall be paid for the unexpired franchise of the company, there is nothing in the ordinance from which it can be even inferred that no allowance was to be made for the going value.

The testimony given on behalf of the city by persons present at the time the ordinance was drawn, to the effect that it was not then supposed that the city would have to pay for any going value, in case of a purchase, not only contravenes all the rules of evidence with regard to the construction of unambiguous written instruments, but can have no weight in any aspect of this question. If, as these witnesses testify, going value was not then discussed, it certainly could not have been excluded.

Upon this question, the decision in the leading case of *National Water Works Co. v. Kansas City*, 62 Fed. R. 853, is controlling and conclusive.

In that case, in which the element of going value was established for the benefit of all future appraisers of water works, *the franchise had expired* and therefore could not be considered as an element of value, any more than in the case now before the Court (pp. 864, 865).

An estimate of going value "does not include an estimate of the value of a continuance of earnings," for, as stated in the *Kansas City* case, "a continuance of earnings rests upon a franchise to operate the water works." But the going value does include, as explicitly held in that case, the

value of a plant capable, from its connections and actual operation, of producing an immediate large income to the purchaser.

While the franchise would be essential and valuable to any other water company purchasing the works, the city had no need to acquire it, because it had, under the statute, full authority to use its own streets and its own public property for the purposes of water works. The exclusion of any payment for the unexpired franchise was, therefore, merely a natural precaution.

Going value is neither franchise value nor good will, but is the value of the works as a going concern, as a concern which is a live entity, not a dead plant.

As was said in the Kansas City case,

“It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that ‘the fair and equitable value’ is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the

individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a water works system without a single connection between the pipes in the streets and the buildings adjacent? Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the water works, and inducements held out therefor. The city, by this purchase, steps into possession of a water works plant, not merely a completed system for bringing water to the city, and distributing it through the pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. *It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn*" (p. 865).

Gloucester Water Supply Co. v. Gloucester, 179 Mass., 365, was a case where the purchase of the company's water works by the city involved, under the terms of a legislative act, the payment to the company of "the fair value of its property" with the further explicit provision that "such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of the company."

The commissioners appointed to determine the price, made, nevertheless, an allowance in their estimate based upon the fact that the plant was a going concern, and in full operation at the time of the transfer. To this allowance the city objected on the appeal, but the allowance was sustained by the Supreme Court of Massachusetts.

The court said:

"It is plain that the real, commercial market value of the property of the water company is, or may be, in fact, greater than 'the cost of duplication, less depreciation, of the different features of the physical plant.'" Citing *National Water Co. v. Kansas City*, 62 Fed., 853.

Also:

"We think it is plain that there is nothing in the provisions of section 16 of the act in question, St. 1895, c. 451, forbidding the commissioners considering this element of value, which, as we have seen, in fact exists * * *

It is plain that the element of value which comes from the fact, that the property is sold as a going concern in which case it has, or may have, in fact a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute" (pp. 382, 383).

Norwich Gas & Electric Co. v. The City of Norwich, 76 Conn. 565, was a case where the "fair market value" of the property purchased by the city was to be appraised, but neither franchises nor good will.

The commission reported that, in reaching its valuation, it had considered that the plants were going concerns, and that their output had been

increasing, and had taken into account their earning capacity and the fact that the company had an established business built up at the risk of private capital after experiments and changes during a long period. On appeal to the Supreme Court of Connecticut, the city contended that the valuation ought to have been confined to the bare physical plant, and that in effect the commission in this instance had put a value on the franchise and good will, although it excluded them in form.

The court held, with respect to the action of the commission in this regard:

“It would not have fulfilled its duty had it estimated the sum to be paid in view only of what the lands, buildings, pipes, wires and other apparatus were worth, considered as separate items. They were to be valued in view of their arrangement for and adaptability to the purposes for which they were provided, *and of their earning capacity as a going concern*” (p. 576).

The court cited, with entire approval, *National Water Works Co. v. Kansas City*, 62 Fed. R., 853, as well as *Gloucester Water Supply Co. v. Gloucester*, 179 Mass., 365.

The “going value” was not an issue in the case of *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, but was assumed to have been a proper element of the valuation of the water works in question for the purposes of determining reasonable rates (p. 9).

The case of *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, is not a case in point, since “going value” is essentially different from “good will”.

Therefore, upon general principles, as well as under these leading authorities, the appraisers

were entirely right in finding that the property of the Omaha Water Company included in the purchase had a going value, as distinguished from the unexpired franchise.

POINT VIII.

The valuation by the Board of Appraisers was properly made as far as practicable as of the date of their report.

While no error in this regard is assigned in the petition for the writ of certiorari, or claimed in the brief in support of the petition, it is now claimed by counsel for the city that "the law requires the valuation to be fixed as of the date of the election to purchase" (Brief, p. 73).

In the bill of complaint in the appraisement suit, verified by the then chairman of the water board, it was averred that the company was contending before the appraisers that they should estimate the value of the property as of the date of the passage of the ordinance of election to purchase the works, and that the City of Omaha was contending that the value of the plant should be fixed and determined as of the date of the award, and it was alleged that, if fixed as of the date of the passage of the ordinance, the estimate of value would be \$200,000 or more greater than the estimate if found and returned as of the date of the award. The bill went on to aver "that if said award shall be made either as of the date

of the appointment of the board of appraisers, or as of a term of years, the said award will be nugatory and void" (Paragraph XVI, Record, pp. 378, 379).

The water company, in its answer, denied that it had contended before the appraisers, or was contending, that the property should be appraised as of the date of the passage of the ordinance of election, but admitted that the complainants were contending that the value of the plant should be fixed and determine as of the date of the award, and while admitting that there might be a difference in value, depending upon the date of estimate, denied any knowledge or information sufficient to form a belief as to what such difference would be (Paragraph XIII; Record, p. 407).

The order entered November 29, 1905, on the motion of the counsel for the city in this appraisal suit, after giving specific directions to the appraisers with regard to their method of appraisal in certain respects, ends thus:

"It is further ordered that the appraisers aforesaid make and return the aforesaid values as far as practicable under the evidence and to the best of their judgment as of the date of the award" (Record, p. 504).

It thus appears that the instruction of the court to the board of appraisers to return their estimate of values as of the date of their report was the definite and final outcome of the application of the water board, and was procured by its counsel

If the board of appraisers had attempted to make the estimates of values as of any other date

than that of their report, they would, of course, have been guilty of contempt of court for the violation of this order.

In their report the appraisers say:

“In accordance with the 8th paragraph of the order of the Court, the appraisers report that the aforesaid values as far as practicable have been made under the evidence and to the best of their judgment as of the date of this award” (Record, p. 165).

In the resolution adopted by the water board on July 9, 1906, after the report was made, it is declared that whereas the two engineers signing the report did not arrive at their valuation as of the date when the ordinance of election was passed and approved, but set down in their report what purported to be their estimate of the valuations of the properties as they existed July 7, 1906, and that in the meantime the prices of iron pipe, water mains, hydrants, valves and machinery had greatly enhanced, therefore, by the adoption of the last named date as the one for fixing the valuation, the City of Omaha had been greatly wronged and damaged, and the valuation as fixed in the report was “illegal and void” (Record, p. 168).

This declaration is virtually reiterated in the answer of the city in the present suit, with the express averment that the engineers “were required under and by virtue of their appointment and the law of the case, to make and return an estimate of valuation as of the date when the city elected to purchase the plant,” and that by reason of the fact that the estimate is not an estimate of the valuation as of the date of the elec-

tion to purchase, the report is "null and void" (Paragraph 23, Record, p. 28).

Prior to the coming in of the report, counsel for the city, in support of their contention that the estimate must be made as of the date of the report, relied upon the decision in *Gloucester Water Supply Company v. Gloucester*, 179 Mass., 365.

Whether or not the original contention or the present position of counsel for the city is right as a matter of law, they cannot now be allowed to impugn the validity of the valuations which have been made as of the date established by order of the court, upon the insistence of counsel for the city.

POINT IX.

By the terms of the ordinance of election the scope of the city's purchase was nothing less than the entire system of water works owned and operated by the Omaha Water Company, wherever located.

1. Neither in the title nor in the body of the ordinance of election of March 2, 1903, is there any ambiguity with respect to the purpose of the city council in availing itself of the right of purchase enuring to the city through the contract contained in Ordinance 423.

The title of the ordinance of election reads:

"An Ordinance declaring that it is necessary and expedient that the City of Omaha

purchase the system of water works operated by the Omaha Water Company, and providing for notification to the water board and to said water company to each select one engineer as an appraiser to ascertain the valuation of said water works plant."

Following the terms of this title, section first of the ordinance reads:

"The mayor and council of said City of Omaha do hereby declare that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, and do elect and determine to purchase and acquire such water works plant by virtue of the rights enuring to said city through the contract between said city and the grantors of said water company, and as authorized and provided by section 14 of Ordinance No. 423" (Record, p. 160).

The contention set forth in Paragraph XIII of the answer in this suit, that it was not the intention of the city council by that election to purchase or acquire any portion of the water works owned by the company, except such as were within the City of Omaha and necessary and appurtenant to the supplying of the city and its inhabitants with water, finds no support in any language of the ordinance. The claim of counsel for the city that the reference in the body of the ordinance of election to section 14 of Ordinance 423, limits the intended purchase to such water works as are precisely described in Ordinance 423, and defines the scope of the purchase by that description, is inconsistent with any reasonable construction. Counsel, indeed, find it impossible to adhere to the strict logic of their argument, which

would necessarily restrict the purchase to the original supply station.

Through circumstances, and by reason of the enlargements and the extensions, both of the supply stations and the distributing mains, which the city authorities, with full knowledge, have acquiesced in during a long period of years, it is inconceivable that the city council, by describing in the most comprehensive language possible the scope of the purchase, really intended to take less than the entire system. Had such limited purpose existed in the minds of the city council, it would have been quite as easy as not to have expressed the narrower intention. Every limitation on the extent of the purchase which has at any time been insisted upon by any of the counsel for the City of Omaha could perfectly well have been expressed in the ordinance of election.

The reference which the ordinance of election makes to section 14 of the Ordinance of 1880, cannot, when taken in connection with the other language of the ordinance of election, be regarded as equivalent to a declaration that the city merely elected to purchase whatever it might be held that the terms of that section gave it the right to take. On the contrary, the declaration that the mayor and council elected and determined to purchase and acquire the system of water works operated by the Omaha Water Company "by virtue of the rights enuring to the city through the contract between said city and the grantors of said water company, and as authorized and provided by section 14 of Ordinance No. 423," is an express claim on the part of the city of the right to make such comprehensive purchase by virtue of the terms of that section.

The city council having thus, in unequivocal language, claimed a construction of section 14 of Ordinance 423, and of the ordinance itself, which would permit the purchase of the entire system of water works operated by the Omaha Water Company, it must be held that it was for the appraisalment of this entire system that the city council appointed Mr. Alvord as its appraiser. The water company accepted that interpretation of the contract and appointed Mr. Benzenberg as the second appraiser, to value just that system and nothing else. The two appraisers thus selected appointed Mr. Mead as the third appraiser, for the same purpose and no other.

Thus, by the action of the parties, construing the ordinance with a view to the powers conferred by the statute, the scope of the contemplated purchase became irrevocably fixed, and it only remained for the contract of purchase to become absolutely complete through the determination of the price by the method which the original ordinance prescribed.

The company's view of the intended scope of the purchase seems to have been accepted by the Circuit Court in passing upon the motion for a continuance of the injunction in the appraisalment suit. In the opinion thereupon rendered the court said:

"It is true, on the other hand, I think, that the ordinance which was passed by the city council, under which the appraisers were selected and appointed, sought, at least, to take in the entire system of water works. To that effect is the title of the ordinance and that is what they say—they say they have the authority to do it under and by virtue of that Ordinance No. 423."

As said in *Knox County vs. National Bank*, 147 U. S., 91:

“It is a familiar rule that the interpretation given to a contract by the parties themselves is competent, and oftentimes very weighty, evidence in determining its meaning and force” (p. 99).

And as said in *Manhattan Life Ins. Co. of New York vs. Wright*, 126 Fed., 82:

“The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error” (p. 87).

See also

District of Columbia v. Gallaher,
124 U. S., 505, 510.

Insurance Co. v. Dutcher, 95 U. S.,
269, 273.

2. If there were any ambiguity in the ordinance of election, such extrinsic evidence as there is in the case would go to show that the city council, in passing the ordinance, and the mayor, in approving it, meant just what the ordinance says.

At a public hearing before the appraisers, July 20, 1903, soon after their organization, Governor Boyd, then chairman of the water board, declared: “The city, I believe, wants to buy the entire works * * * I believe that is the opinion of nine-tenths of this city. We want to purchase

the entire property if we possibly can do it. We expect to do it " (Record, p. 659).

There is nothing in the evidence to show that the agitation, continued for years, for municipal ownership of the company's water works, ever contemplated the ownership by the city of anything less than the entire plant, wherever located.

It appears that the question of power in the city to own and operate portions of the works located outside of the city limits was originally suggested by Mr. Congdon, a lawyer, who was a member of the water board (Record, pp. 464-467). Although it was early raised before the appraisers by the then city attorney, who has since been counsel for the water board, no action was taken, nor, so far as appears, was any action attempted, on the part of either the city council or the water board to rescind or modify the ordinance of election, or to limit the scope of the purchase declared by that ordinance.

The silence of the city authorities during this period of three and one-half years, during which the proceedings were pending, with full knowledge on the part of the city council and the water board, which they must be presumed to have had through their counsel, if not otherwise, of the course the proceedings were taking, is not only highly significant, but should be regarded as legally conclusive, with regard to the real intention of the ordinance of election.

It is certain, also, from official action of the water board and the affirmative vote of the electors of the city, since this case was brought here for review, of which action and vote this court is asked to take judicial notice, that the water board regards the purchase as intended to include the

entire system of water works, and that the electors of the city have authorized an issue of bonds for the avowed purpose of paying for the entire system (See pp. 166-174 of this Brief).

3. It may well be held, moreover, that the city is equitably estopped from now claiming that it has never been its purpose to acquire the entire system of the complainant.

In its bill of complaint and in its amended bill in the forfeiture suit brought by the city in 1896, to which the Omaha Water Company was made a party, the city asserted that it had the power to own and operate this entire system of water works, and claimed the right to forfeit the entire system under section 11 of the Ordinance of 1880, which in its terms is no more comprehensive than section 14 of Ordinance 423, and which specifically makes the method of compensation in case of forfeiture the same as the method of determining the price in the case of a purchase (Record, pp. 668, 679).

It is clear, under the authorities, that an equitable estoppel may arise in such a case, applicable to a municipal corporation as well as to any other corporation or to an individual.

Reynolds v. Adden, 136 U. S. 348;
Hackett v. Ottawa, 99 U. S. 86, 96;
County of Randolph v. Post, 93 U. S. 502, 513;
Bissell v. City of Jeffersonville, 24 How. 287, 300;
Sullivan Timber Co. v. City of Mobile, 110 Fed. 186, 197, 198;
Brooks v. Laurent, 98 Fed. 647;
Garber v. Doersom, 117 Pa. St. 162;
Munroe v. Danbury, 24 Conn. 199.

It is not an answer to the claim of an estoppel to assert that the city was unsuccessful in the forfeiture suit, and therefore is not estopped by the averments and claims of its bills. That suit was not defeated on the ground that the city could not claim, if a case of forfeiture were made out, that all the property described could not be included in such forfeiture, nor on any denial that it could be included. The suit failed simply because the company's contention that no case of forfeiture was made out by the city was sustained. Nor is it enough to say that the city could not be estopped by a pleading verified by the city attorney. If the authority of the city attorney to bind the city by a pleading is not sufficient, how can any attorney so bind a client?

Especially should the city be held to be estopped where the city authorities stand by and see a suit or an appraisement go on to a completion, without any official withdrawal of the claims made in a bill of complaint or ordinance. The averments of the bill and amended bill in the forfeiture suit show at least that the city then placed the same construction on the scope of Ordinance 423 which has been placed on it by the city council in passing the ordinance of election in 1903.

As said in *State ex rel. Tarr v. Mayor and Council of Crete*, 32 Neb. 568, and by the Circuit Court of Appeals in the hydrant rental case of *Omaha Water Company v. City of Omaha*, 156 Fed. R. 922, "A city like an individual should act in good faith in carrying out its contracts."

There can, then, be no serious question that the scope of the city's intended purchase was nothing

less than the entire system of water works operated by the Omaha Water Company, and that such must be held, for the purposes of this suit, to be the scope of such purchase.

POINT X.

The City of Omaha had ample power to make the purchase of the entire system of water works operated by the Omaha Water Company.

1. While conceding the established rule to be that municipal corporations can exercise no powers which are not in express terms, or by fair implication, conferred upon them, counsel for the respondent contend that the City of Omaha has ample statutory authority to acquire and own and operate the entire system of water works owned and operated by the Omaha Water Company.

Under the provisions of the Nebraska statute of 1879, amending the act to incorporate cities of the first class, the mayor and council had the undoubted power to provide, on behalf of the City of Omaha, as one of the terms of the contract with Locke, that the city should have the right, at any time after the expiration of twenty years, to purchase the water works at an appraised valuation. Such a provision has repeatedly been held to be properly an incidental part of a main agreement for the construction of water works and the sup-

ply of water to municipalities for public and domestic purposes.

Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 10; and cases there cited.

See also *City of Indianapolis v. Consumers Gas Trust Co.*, 144 Fed., 640;

City of Fayetteville v. Fayetteville Water, L. & P. Co., 135 Fed., 400.

The valid exercise of such option by the City of Omaha under the Ordinance of 1880 has been expressly recognized in *Omaha Water Company v. City of Omaha*, 147 Fed. 1, 7.

When the ordinance of 1880 was passed, the City of Omaha had statutory power, under that Act of 1879 "to erect, construct and maintain water works either within or without the corporate limits of the city." Yet, inasmuch as advantage of the provision for purchase could not be taken for at least twenty years, the ordinance may be held to have contemplated such a situation, legally considered, as would exist at the time of the exercise of the option.

The question of power in this case, may, therefore, be resolved by consideration of the statutory authority with which the City of Omaha was clothed on March 2, 1903.

Prior to March, 1903, the City of Omaha had become a metropolitan city—and the only metropolitan city—within the classification established by the statutes of Nebraska. As such, it then had,

under Section 135 of the city's charter of 1897, as reiterated in the amendment to that section in Chapter 12 of the Laws of 1903, "power to erect, construct, purchase, maintain and operate . . . water works . . . either within or without the corporate limits of the city, and power to fix, charge and collect a rental or compensation for the use of . . . water . . . and to make all needful rules and regulations concerning the use of such . . . water . . . and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same" (See Appendix to this Brief).

Under Section 27 of this Charter of 1897, the City of Omaha also had, in 1903, power "to appropriate private property for the use of the city for . . . water works, including mains, pipe lines and settling basins therefor, the right and power to appropriate private property for . . . water works to extend for a distance of ten miles from the corporate limits of the city"; also, the power "to appropriate any water works system, plant or property already constructed to supply the city and inhabitants thereof with water or any part thereof, whether lying or being wholly within said city, or any part therein, and any part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, business, reservoirs, and all appurtenances reasonably necessary thereto and a part thereof or connected with said system, plant or property, and franchises to own and operate the same, if any" (See Appendix to this Brief).

Apart from this broad authority to purchase and operate water works "either within or without the corporate limits of the city" the City of Omaha was, by Chapter 12 of the Laws of 1903, not only empowered, but required, to construct or purchase *a system of water works*.

By section 1 of this Act, it was made the duty of the mayor and council, within a limited time, in a case where bonds had been voted for the construction or purchase of a water plant, to "declare by ordinance, that it is necessary and expedient for such city to construct or purchase, as the case may be, a system of water works."

It was further, by section 3, declared that, in a case where bonds had been previously voted for the purchase of a water plant, as was the case in the City of Omaha, it should be the duty of the mayor and council to "proceed to take the necessary steps to acquire such water plant under the powers granted by the charter of such city, or by virtue of any rights enuring to such city, through contract or otherwise."

The act goes on to prescribe the procedure for the appointment of appraisers in the case of such a purchase and for the appointment also of a water board to have general charge and supervision of the water plant constructed or purchased, and the appointment of a water commissioner to act as secretary of the board and to have general supervision and management of the construction or operation and maintenance of the water plant, subject to the direction of the board, with other extensive provisions relative to the purchase, construction, maintenance and management of a water works plant (See Appendix to this Brief).

Nowhere in the act is there any attempt to restrict the broad power of purchase and operation given by section 135 of the charter of 1897, but that section is expressly re-enacted in this act of 1903. The comprehensive description of "a system of water works" as the contemplated subject of the purchase thus virtually required by the first section of this enactment, remains unqualified throughout the act. Furthermore, section 10 of the act expressly declares that "the authority and powers herein conferred upon the water board shall extend as far beyond the corporate limits of said city as said board may deem necessary, not to exceed ten (10) miles."

It was in pursuance of this legislative direction and in accordance with this legislative authority and reiterated charter power, that the mayor and council, by the ordinance of election, declared that it was necessary and expedient for the City of Omaha to purchase and acquire the system of water works operated by the Omaha Water Company, and to acquire such water plant by virtue of the rights enuring to the city through the contract in Ordinance No. 423.

It is evident that the language of section 27 of the charter of 1897, which was not restricted in any degree by the act of 1903, and which expressly authorized the City of Omaha "to appropriate any water works system, plant or property already constructed to supply the city and the inhabitants thereof with water," had reference directly and solely to the water works system of the Omaha Water Company.

It is also obvious from the language employed, that the power granted to the city by the reiterated section 135 of the charter of 1897, to pur-

chase, maintain and operate water works either within or without the corporate limits of the city, could only have reference to the water works of the Omaha Water Company.

It is equally unmistakable that, when the act of 1903 referred to the purchase by the City of Omaha of "a system of water works," under the powers granted by the charter of such city, or by virtue of any rights enuring to the city through contract, it had exclusive reference to the system of water works then operated by the Omaha Water Company, including all existing extensions.

It is undisputable that the language employed in each of the sections cited from the charter of 1897 and from this act of 1903 is fully broad enough to authorize the acquisition by the City of Omaha of title to a system of water works without geographical restriction.

The evidence in this case shows that in the year 1903, and for more than ten years before, the system of water works operated by this company consisted of a supply station at Florence as well as a supply station within the corporate limits of Omaha, and distribution systems in Florence, South Omaha, Dundee and East Omaha as well as in Omaha, and that, except at Florence, these distribution mains received their supply of water from mains passing through Omaha, all being fed from the same supply stations as Omaha itself, and being operated in all respects as inseparable parts of one system of water works, with only one available source of supply (Record, pp. 572, 578).

Apart from proofs in the case, the court can take judicial notice that, during the whole of this

period, this state of facts must have been well known not only to the city authorities of Omaha, but to its citizens generally, and to the members of the Nebraska legislature.

It is therefore not only a reasonable, but inevitable, construction of the provisions of the city charter and the act of 1903, expressly authorizing the purchase of "a system of water works", that it was the intention of the legislature thereby to describe the system of water works then generally known to be operated as an indivisible system by the Omaha Water Company.

2. It was not inconsistent for the legislature of Nebraska to authorize the acquisition and operation by the City of Omaha of the portions of the company's distribution system that were located without the limits of Omaha and within the limits of other municipalities, nor was it contrary to the public policy of the State.

Counsel for the city have heretofore argued in this case that the City of Omaha has no more power to purchase a water plant in South Omaha than it would have to purchase and maintain the parks of South Omaha; and the statement would apply equally to parks in any adjacent municipality. But the Court can take judicial notice of the geographical fact that the City of Omaha has purchased, and does maintain, a park outside its corporate limits—namely, Elmwood Park.

And this the City of Omaha does under the express legislative authority of section 101-b of the city charter of 1897 (not affected by the Act of 1903), which authorizes the acquisition by the City of Omaha of a "system of public parks, parkways and boulevards, or additions thereto, within

the city, or within three miles of the limits thereof," and expressly authorizes the mayor and council, upon the recommendation of the park commissioners, and with their concurrence, to purchase, in the name of the city, lands within such limits, to be used and improved for parks, parkways or boulevards, notwithstanding said limits include lands within the corporate boundaries of other cities or villages; and if such lands are within the limits of other cities or villages, said cities or villages are to cease to have any jurisdiction over such lands, after they are acquired for parks, parkways or boulevards, whether by gift, purchase, condemnation or otherwise (See Appendix to this Brief).

Thus the legislature has authorized the City of Omaha to acquire by purchase or condemnation lands for parks, parkways, and boulevards within the corporate limits of any adjacent municipalities, if not more than three miles from the city limits, and thereby not only to invade the territory of these adjacent municipalities, but, without references to the wishes of their authorities, to acquire jurisdiction over all the properties thus acquired.

There is, therefore, nothing in the law or policy of the State of Nebraska with respect to municipal corporations, inconsistent with the acquisition or operation by the City of Omaha of the distribution systems now operated by the Omaha Water Company within Florence, South Omaha, Dundee or East Omaha.

As the statutory authority stood prior to March, 1903, there was thus not only power in the City of Omaha to operate, as well as own, the portions

of the company's system of water works lying within these adjacent municipalities, but such power was by fair, and indeed necessary, implication, confirmed by the Act of 1903, in authorizing the purchase by the city of this "system of water works" and providing for its subsequent operation by the water board, whose powers in that regard were expressly extended as far beyond the corporate limits of the city as the board might deem necessary, not exceeding ten miles.

3. While no subsequent legislation could restrict the scope of the purchase which the city, in March, 1903, elected to make under the statutory authority then existing, the question of the effect of any enabling provisions in subsequent statutes may properly be considered. Chapter 15 of the laws of 1905, amending section 7661 of "Cobbey's Annotated Statutes of Nebraska, 1903," contains this clause (Sec. 242 Compiled Statutes of 1907, *post*):

"The water board may contract with any municipality adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes, or may contract, to the same end, with any person, co-partnership, or corporation, supplying any such adjacent municipality with water for domestic, public, or fire purposes, upon such terms and conditions as said water board may deem proper; provided, however, that all water so furnished shall be measured by meter at the expense of such municipality, person, co-partnership, or corporation, as the case may be; and that the rate per thousand gallons, fixed by said water board, shall not be less than the gross average income per thousand gallons for all water furnished such metropolitan city and its inhabitants by such mu-

nicipal water plant; provided, further that in computing the income of such water plant, each fire hydrant located within such metropolitan city shall be assumed to produce a reasonable revenue to be definitely fixed by said board."

This act clearly invests the City of Omaha with full power to make with any municipality adjacent to the city any contract to supply such municipality with water for domestic, mechanical, public or fire purposes, which any prior owner of a distribution system within such adjacent municipality might make.

The further power to contract, to the same end, with any person, co-partnership or corporation, supplying any such adjacent municipality with water for domestic, public or fire purposes, involves a clear authority to take over any existing contract or contract rights, which such corporation may have for such purposes.

Applied, as it must have been intended to be, to the existing situation, the Omaha water board is thus given ample authority to make with the City of Florence, or the City of South Omaha, or the Village of Dundee, or any other adjacent municipality, essentially such a contract for supplying each one and its inhabitants with water for domestic, mechanical, public or fire purposes as the Omaha Water Company itself, and its predecessors, were authorized to execute, and did execute, with the City of Omaha, the City of Florence, the City of South Omaha, and the Village of Dundee, to supply all those municipalities with water for such purposes.

By authorizing the water board to "contract with any municipality adjacent to such city to

supply such municipality with water for domestic, mechanical, public or fire purposes," or to "contract, to the same end, with any corporation supplying any such adjacent municipality with water for domestic, public or fire purposes," the act in effect declared the purpose of the contract to be the same in both cases. When the act referred to a corporation "supplying any such adjacent municipality with water for domestic, public or fire purposes," it described the Omaha Water Company, which was then supplying private consumers in South Omaha, as well as the city itself, with water.

The use of the same language with regard to the supply which the water board may contract to give permits a supply equally extensive. In other words, the description in the act of a "corporation supplying any such municipality with water for domestic, public or fire purposes" necessarily describes a corporation which is supplying private consumers as well as the municipal corporation, and the same descriptive language with regard to the supply which the water board may contract to furnish must necessarily have a co-extensive meaning.

Moreover, authority to supply a municipality with water for domestic and mechanical purposes should seem to involve power to supply private consumers within the bounds of such municipality. Such is the description of the power granted to the water board by the act of 1905, as well as the power described as being exercised, and known to be exercised, by the Omaha Water Company.

4. There is no inconsistency in the use of the word "municipality" in the act of 1905 in two

senses. The word may have, like the word "City" and the word "Village," a geographical as well as governmental meaning.

State v. Elliott, 158 Ind., 168; 63 N. E., 222;

Miller v. Town of Jacobs, 70 Wis., 122; 35 N. W., 324.

The comprehensive language used in the act to embrace adjacent municipalities is equivalent to saying that the water board may contract with the City of Florence and the City of South Omaha to supply such cities and their inhabitants with water for private and public purposes, and may contract with the Village of Dundee to supply such village and its inhabitants with water for the same purposes. In other words, the City of Omaha is given power to make with the other municipalities contracts of precisely the same type as the existing contracts which those municipalities and the City of Omaha now have with the Omaha Water Company.

5. The argument that has been made by counsel for the city that all rules of construction applicable to municipal charters and powers, when applied to the act of 1905, preclude the idea "that the City of Omaha is going into the water business as a private corporation might do," falls short of the mark at which counsel is aiming. For, as matter of fact, through the purchase of any part of the company's system of water works, the City of Omaha is necessarily going into the water business as a private corporation might do. The supplying of water to the inhabitants of a city is not within the inherent general powers of a

municipality. Although necessarily partaking of a public character, it falls under the head of business powers instead of governmental authority, and can only be undertaken with express legislative sanction.

Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed., 271, 282;

Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed., 1, 11;

As said in *Lehigh Water Company's Appeal*, 102 Pa., 515:

"The gas cases established the principle that a municipal corporation may perform the functions of a private corporation in supplying its citizens with gas and water" p. 528).

See also *White v. Meadville*, 177 Pa., 643.

Therefore, the purchase by the City of Omaha of a system of water works, to be operated under the charge of the water board for the supplying of the City of Omaha, and the citizens and inhabitants thereof, with water for domestic, public and fire purposes, while clearly a matter of public concern, necessarily involves going into the water business as a private corporation might do—in fact, going into the same water business which the Omaha Water Company is already conducting.

There is no conceivable difference in principle between authority of the water board to make a contract with any adjacent municipality to supply such municipality with water for domestic, mechanical, public or fire purposes, and the undertaking to supply the City of Omaha itself with water for precisely the same purposes, or to con-

tract to the same end with a corporation already supplying such adjacent municipality with water for all of those purposes. It is "going into the water business" in any case, and there is express legislative authority for it in every case.

The power expressly conferred on the water board to contract with any adjacent municipality to furnish such municipality with water for all the purposes specified, necessarily confers on each adjacent municipality adequate authority to enter into such a contract on its part, even if the authority were not already ample under previous statutory authorizations.

6. With such broad authority in the City of Omaha to contract with adjacent municipalities to supply them with water for all purposes, the question of title to the distribution mains and hydrants within the boundaries of those municipalities becomes a subordinate matter. The power to acquire title to such property is clearly within the terms of section 135 of the city charter and the terms of the act of 1903, and the city can as properly distribute the water through those vehicles as sell it at the city limits.

A similar question was raised in the case of the Kansas City purchase, where it was objected that the city, by virtue of certain amendments to its charter and certain acts of the legislature, had become disabled from taking the title to all the property which made up the water works system. The objection in that case was raised by the company. Passing on the objection, the Court said:

"This is a matter in respect to which the company need not concern itself. If it is paid the fair and equitable value of the property, as provided by the contract, then its rights

have ceased, and the city can settle with other parties the matters of title and possession.

National Water Works Co. v. Kansas City, 62 Fed. R., p. 864.

Subject to the right of the City of Florence to a perpetual supply of water for public and private uses by reason of underlying agreements, the City of Omaha, on acquiring the company's system of water works, will acquire also the valuable rights which the Omaha Water Company has by virtue of contracts with the other adjacent municipalities. The same is true of the distribution system within the boundaries of East Omaha, which the East Omaha Land Company has not exercised the option to purchase, leaving the water company free to convey the same to the City of Omaha.

If the Omaha Water Company, a private corporation, could own and operate a distribution system in the adjacent municipalities for the supply of those municipalities with water for domestic, public and fire purposes, the legislature naturally could see no good reason why the City of Omaha should not be clothed with the like power.

None of the adjacent municipalities has raised the slightest objection to this.

7. The legislation of 1905, amplifying specifically existing authority, must be presumed to have been enacted in view of the circumstances of the situation, community of interest and future closer relations between the City of Omaha and these adjacent municipalities—and of an ultimate consolidation, which the experience of all great municipalities in this country makes absolutely certain.

8. The provision in the Act of 1905 that for water furnished by the City of Omaha to adjacent communities the rate per thousand gallons, fixed by the water board, shall not be less than the gross average income per thousand gallons for all the water furnished the City of Omaha and its inhabitants from the one municipal water plant, may be regarded as relating primarily to a method of measurement of the water with a view to equality with respect to price. Whether or not in actual operation the method would succeed or fail cannot be considered in determining the power of the City of Omaha to purchase and operate the entire system of water works under pre-existing statutory authority. If this provision be regarded as contemplating a wholesale flat rate and settlement only with the adjacent municipality, instead of individual consumers, it may still have to bear the test of equality of price to which the city, as owner, might be held to be subject; but the effect of the provision in this regard could not retroact restrictively upon the previous exercise of an ample statutory power of purchase.

It certainly is not to be presumed that the legislature of Nebraska, in passing this act of 1905, intended to discriminate against these adjacent municipalities or their inhabitants.

If the act of 1905 be regarded as intended to restrict the acquisition by the City of Omaha to so much of the respondent's system as lies within the corporate limits of that city, in connection with the supply system at Florence, as is contended by counsel for the city, that purpose could only be accomplished in case of the failure of the purchase elected to be made in 1903.

As pointed out by the Circuit Court of Appeals, such provision, if given the construction so contended for, would produce a result, as regards the water company, so inequitable that it cannot be presumed to have been intended. That would mean that the City of Omaha, upon payment of \$487,224.17 less than the valuation placed by the appraisers on the entire system, would acquire a property more valuable to it than the system in its entirety would really be. For it is manifest that it would be more profitable to the City of Omaha to furnish water to the adjacent communities, as customers, without obligation to maintain their distribution mains and hydrants, than if it were the responsible owner of such mains and hydrants. But, whatever the result or the intention of this provision of the act of 1905, it cannot avail to defeat the present purchase or restrict its scope or serve as a defense to this suit.

9. Relevant here is the decision in *Peabody v. Westerly Water Works*, 20 R. I., 176, where a taxpayer of Westerly, Rhode Island, brought suit to enjoin the purchase by that town of the plant of the water works company, located partly in the town and partly in the neighboring towns of Stonington and North Stonington, Connecticut.

There had been no legislation on the subject by the Connecticut legislature, nor had the towns of Stonington and North Stonington acted with reference to the purchase and transfer of the portion of the plant within their corporate limits. The legislature of Rhode Island, however, had authorized the water works company to sell, and the town of Westerly to buy, all the property and rights and franchises of the former, "whether

situate, held, enjoyed or exercised by it within or without the State of Rhode Island."

The Supreme Court of Rhode Island dismissed the bill and held the purchase to be valid. The court said:

"The claim that the water works cannot sell, nor the town acquire, that portion of the plant of the former situated in the towns of Stonington and North Stonington, Connecticut, rests on the assumption that the right granted by the legislature of Connecticut to the water works to construct and maintain that portion of its plant in that State, is merely a revocable license specially conferred on the water works. Granting this to be true, it is not to be assumed that the legislature of Connecticut will arbitrarily revoke the license *because of a change of ownership from the water works to the town. No reason is shown why the ownership of the plant by the town of Westerly, instead of by the water works, should be deemed objectionable by the legislature of Connecticut*" (pp. 178, 179).

It was not doubted by the court in that case that the town of Westerly might lawfully both purchase and operate an existing system of water works, extending not only into adjacent municipalities but into an adjacent State, without the necessity, and in the entire absence, of any concurrent action on the part of those municipalities or the State in which they were located.

10. None of the cases cited by counsel for the city is in conflict with this decision.

While, as held in *Farwell v. The City of Seattle*, 86 Pacific, 217, a city cannot undertake the scheme, as an original proposition, of construct-

ing works to supply an adjacent municipality with water, except under the most explicit legislative authority, there is nothing in municipal law to prevent the acquisition and operation of outlying portions which are an integral part of an existing system, having a common source of supply, which system the city has, by legislative enactments expressed in broad general terms, unqualified authority to purchase, with express supplementary authority to supply water to all the outlying portions.

The difference in circumstances of fact and of legislative authority, clearly distinguishes the present case from the other cases cited in the brief of counsel for the city, as well as the case last referred to.

Arnold v. Mayor of Pawtucket, 41 Atl. 576; 21 R. I. 15, furnishes no support to the construction claimed for the act of 1905 by counsel for the city. Two sections of a statute incorporating the Watchemoket Fire District were there considered. One of these sections was as follows:

"Sec. 9. Said district is hereby authorized to receive water from the City of Providence, or the town of Pawtucket, upon such terms as may be agreed upon by the city council of said city, or the town council of said town and said district, and said city and town are hereby authorized and empowered to supply water to said district and make such agreement."

So far, an authority was conferred which might be similar to that conferred by the Nebraska act. Under each statute authority was given to one municipality to contract with another to supply water to such municipality.

It does not appear that the agreement which was enjoined in the Rhode Island case would have been objectionable, except for the following section of the statute then under review:

“Sec. 10. Said *district* may distribute the water throughout the district, or authorize the same to be done, regulate its use and the price to be paid therefor, within and without the district, within the limits of the town of East Providence.”

All that was held by the Rhode Island court was that the authorities of the City of Pawtucket could not enter into an agreement to furnish water to the inhabitants of the water district directly, “charging to and collecting from them water rents for the use of the water at the same rates charged by the city to its own inhabitants, and under the same rules and regulations”, in view of the express language of Section 10 of the act, which required that the water be distributed, and its use and its price be regulated, only by the district itself.

No question of power of purchase was involved in the Rhode Island decision, but merely a question of allowable terms of agreement under express statutory restrictions.

The case of *Inhabitants of Quincy v. City of Boston*, 19 N. E., 519; 148 Mass., 389, turned wholly upon the construction of a statute defining the authority given the City of Boston to distribute water.

It was held that the statute in question did not contemplate such distribution to Long Island, an island in Boston Harbor, which, although territorially a part of the City of Boston, was three miles distant from the actual city. It was for

this reason that the court sustained an injunction, applied for by the inhabitants of Quincy, to prevent the laying of pipes through the highways of Quincy, in order to reach Long Island, and not because such highways were safe from invasion. For the court said:

“We shall assume that, if the city has power to carry water to Long Island, it has incidental power to carry it through the highways of Quincy” (p. 390).

In the present case, where the City of Omaha has general legislative authority to purchase “water works”, without as well as within its corporate limits, and special legislative warrant for the purchase of “a system of water works”—necessarily that of the Omaha Water Company—and express legislative authority to contract with adjacent municipalities to supply them with water for domestic and mechanical as well as fire and public purposes, this Court must surely conclude that the city has ample power to acquire and utilize to that end the pipes and hydrants already laid and erected and in operation within those municipalities, as a part of that system, and actually supplying water for those very purposes.

The decision in *Town of Bristol v. Bristol and Warren Water Works*, 49 Atl. 974; 23 R. I. 274—in so far as there was a decision—had reference to the peculiar circumstances of that case, which are not the circumstances of the case before this Court.

In that case, while the source of supply for both Bristol and Warren was from the same watershed, and the reservoirs of the company furnished water for both towns, the towns were so located

that each could be independently supplied and a complete separation made of the two systems. Even so, it was not clear to the court precisely how the separation should be made, and the case was therefore sent back to a master for an apportionment and estimate of relative values.

The present case, like that, must be decided with reference to its own circumstances. Here the communities adjacent to the City of Omaha, except Florence, which has an independent right to water distribution, necessarily receive their supply from mains passing through the City of Omaha and forming an essential part of a single water-works system. Not only do these communities depend for their water supply upon the mains laid through Omaha, but the consequently increased size and efficiency of these mains may, in an emergency, be to the advantage of Omaha and its citizens in the protection of their property.

The case before the Court is in certain aspects not unlike that of the *City of Duluth v. Duluth Gas & Water Company*, 47 N. W., 781; 45 Minn., 210. In that case an attempt to prevent the water company supplying the City of Duluth with water, from furnishing water also to places out of Duluth and in its vicinity through the mains laid in its streets, under ordinance of its council, was defeated. The City of Duluth had no power to contract for a supply of water to any community outside the corporate limits of Duluth, nor did the council attempt to do so. The court said:

“While the council could not contract that the defendant should supply any other place through the mains laid to supply Duluth (or by any other means), we do not think it an

objection to the exercise of the power to contract that other places may be supplied through the mains which the council contracts for. The council might, of course, have contracted for mains and pipes exclusively to bring the water to Duluth and its inhabitants, and it could not contract for laying through the streets, mains and pipes having no connection with that purpose. *But, that purpose being accomplished, we do not think it affects the contract providing for it that defendant may use the instrumentalities by which it is accomplished in the general business of its incorporation*" (p. 783).

This description of the situation at Duluth applies, in many respects, to the situation at Omaha. Of course, the city council of Omaha could not originally have contracted for the laying through its streets of mains and pipes having no connection with the purpose of supplying the city and its inhabitants with water. The council might, perhaps, have contracted for mains and pipes exclusively to bring the water to Omaha and its inhabitants, but it failed to do so. The primary purpose of supplying Omaha and its inhabitants with water being accomplished, the water company, predecessor of the appellant, could lawfully use the instrumentalities by which this purpose was accomplished to supply also, without detriment to Omaha and its citizens, the municipalities adjacent to the city.

The very language of the original ordinance contemplated the construction and maintenance of water works "within and adjacent to the City of Omaha" (Sec. 1, Record, p. 680).

The present situation at Omaha having, therefore, come about lawfully, may fairly be consid-

ered in all its features in arriving at a proper construction of statutes enacted with direct reference to such situation.

Where the legislative intent is apparent, that one municipality shall have authority to own and operate water works beyond its own limits, the courts invariably give effect to that intent.

In *City of Pittsburg v. Brace*, 27 Atl., 854, 158 Pa. St., 174, such authority was granted almost incidentally, and evidently with reference to an existing situation, the provision of the statute being that "the mayor, aldermen and citizens of Pittsburgh may, from and after the passage of this act, proceed to recover water rents due and unpaid beyond the limits of the city, as well as within the same, in the same way as city taxes are now recoverable." While conceding that the city could exercise no extra territorial jurisdiction without some special provision authorizing it, the court held that this provision was sufficient to authorize the collection of water rents through resort to a lien for water supplied outside the city.

Town of West Hartford v. Board of Water Commissioners, 36 Atl., 786, 68 Conn., 323, was a case where the source of water supply for the City of Hartford and the town of West Hartford was in that town. The act which authorized the City of Hartford to avail itself of this source of water supply provided that the City of Hartford should supply the inhabitants of West Hartford living within a reasonable distance of the water mains with water. After a time the water commissioners of the City of Hartford sought to limit the territory within which the inhabitants of West Hartford should be supplied. This was a situation

similar to that existing at Omaha with reference to the right of the City of Florence to a distribution system for public and domestic purposes.

Not only was the right of the inhabitants of West Hartford to insist upon the full continued supply sustained, but the court incidentally commented upon a situation similar to that now existing between the City of Omaha and the City of South Omaha.

With reference to the date of the original enactment the court said:

“At that time the City of Hartford did not include within its limits the whole of the town of Hartford. A large part of the territory and of the population of the town was outside of the city. *These people needed to be furnished with water quite as much as the people in the city itself*” (p. 333).

To the like effect is the decision in *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. R., 1.

At the time of the transactions passed upon in that case, the statutes of Colorado provided, with regard to Towns and Cities (2 Mills. Ann. Stat.):

“Sec. 4403, Sub. 67. They shall have power to erect waterworks . . . or to authorize the erection of the same by others” and

“Sec. 4403, Sub. 68. They shall have power to construct, or authorize the construction of such water works, without their limits, and for the purpose of maintaining and protecting the same from injury, and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains used in or necessary for the

construction, maintenance, and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which the same is taken."

Under this general authority the City of Colorado Springs had, by ordinance, granted for a term of years the right to lay, maintain and operate an electric lighting system throughout the streets of the city and to divert and use, for the generation of electrical power, all the water from sources controlled by the city, on condition that all water so diverted should be returned to the water system of the city unimpaired, and that the use thereof under the contract should not diminish the flow nor pollute the water. Subsequently, the city passed an ordinance repealing the ordinance described. Thereupon, the intervention of the court was invoked to have the repealing ordinance adjudged void, as violative of the constitution of the United States. The suit was defended on the ground, chiefly, that the City of Colorado Springs had no power to make the contract in question, or to vest in any one the rights and privilege bestowed by the original ordinance. On an appeal, the Circuit Court of Appeals declared the repealing ordinance invalid, and laid down principles applicable to the question under present discussion.

11. In so far as the construction of the acts of 1903 and 1905 may be aided by the facts of the situation, there is ample support in those facts for the intention which counsel for the company insist that the language of the acts discloses. Apart from the evidence in the case, the court, as was said in *Bryant v. Estabrook*, 16 Neb. 217, "must take judicial notice of the public geography and

history of the State"; and equally, it should seem, of Omaha and the adjacent municipalities, their relative location, their physical peculiarities, their business and social relations, their growth into virtually one community, their inevitable merger into one municipality.

It is a matter of common knowledge that the rapid growth of South Omaha in business enterprises and the development of Dundee as a place of residence created an imperative demand on the part of those residing and doing business there for an adequate water supply. As was said by the Connecticut Supreme Court in the case already discussed, "these people needed to be furnished with water quite as much as the people in the city itself."

It is equally evident that there was no safe or adequate supply of water for any of these communities nearer than Florence, and that it was impracticable to supply any of them, other than Florence, except from mains laid through the City of Omaha.

Such supply was so furnished with full knowledge on the part of the authorities and citizens of Omaha and without objection from anyone. What was done was done with more reason, because under greater necessity, than in the Duluth case. It is too clear for argument that, so long as the Missouri river runs, and a supply and a distribution system adequate for the supply of these adjacent communities as well as Omaha are possible, the supply must be maintained. No court would ever cut it off or allow it to be severed, whatever the ownership of the water works system.

Nor can it be held to be to the disadvantage of the City of Omaha to own and operate the por-

tions of the distribution system lying within these adjacent municipalities. The city claims in its answer in this suit that the valuation placed on these portions in the appraisement is less than their true value, and the evidence in the case is to the effect that the operation of those portions would be highly profitable to the city.

It must be considered that when the act of 1903 was passed, it was passed with full knowledge on the part of the members of the legislature of the notorious facts of the water works situation at Omaha, and of the probable merger, at no very distant date, of the municipalities closely grouped there.

The Court should therefore conclude that when the legislature by that act expressly authorized the City of Omaha to purchase "a system of water works" and expressly conferred on the water board authority and powers to extend ten miles from the corporate limits of the city, the legislature, with a view to the future, contemplated the acquisition and operation by the city of precisely the system of water works then owned and operated by the Omaha Water Company.

The Court should further consider that when the act of 1905 was passed, it was passed with full knowledge on the part of the members of the legislature of the notorious facts that the mayor and city council of Omaha had, by an unrepealed ordinance, elected, under the alternative mandate of the Act of 1903, that the city purchase "the system of water works operated by the Omaha Water Company," and that such system was then under appraisement for the purpose of determining the price. The Court should therefore conclude that, when the legislature, in the act of 1905.

expressly authorized the water board, already vested by section 10 of the act of 1903 with the "general charge, supervision and control of the design, construction, operation, maintenance and extension or improvement of any water plant owned or operated by such city," and with jurisdiction for those purposes ten miles beyond the corporate limits of the city, to contract with any adjacent municipality to supply such municipality with water for domestic, mechanical, public or fire purposes, it did so in order to clothe thus specifically the water board, as the agency which was to succeed the city council, with the fullest authority to operate everywhere the system of water works which the city was preparing to take over and operate upon completion of the purchase it had elected to make.

It should be noted that at the same session, the legislature passed an act authorizing the merger of these adjacent municipalities with the City of Omaha (Laws of 1905, Ch. 14, Sec. 2).

Neither the city council nor the water board had meanwhile attempted to withdraw or modify in any particular the ordinance of election to purchase the entire system of water works operated by the water company.

Therefore, the only objection ever made to the complete purchase authorized in terms both broad and specific by repeated legislative enactments, and agreed upon by the City of Omaha and the Omaha Water Company, through definite, unambiguous action of the city council and the company's board of directors, placing the same construction upon the provision for purchase in the original ordinance, is the objection raised by counsel representing the city, and adopted in this suit

by the water board as a means of defeating the appraisalment.

In order to sustain such defense to this suit, counsel for the city are compelled to insist that the act of 1905 controls the purchase elected to be made by the city in 1903, and to contend for a construction of that act which is contrary to equity and reason. Either the act of 1905, in respect to contracts by the water board with adjacent municipalities, was intended to be an enabling act, for the purpose of placing beyond question the authority of the water board with respect to operation, or it was framed ambiguously with a dishonest purpose. Had the appraisalment been satisfactory in amount to the water board, there can be no doubt that it would have regarded the act as an enabling act. If the construction now contended for by the counsel employed by the water board—that by this act the power of the City of Omaha is restricted to “a contract to *deliver water* to a water works system in an adjacent municipality”—be upheld, it must lead to the inequitable result that the City of Omaha can, on payment of a materially reduced price, limit the comprehensive purchase it has clearly elected to make, to such portion of the system as will enable it to supply water to adjacent municipalities, or to the water company, at a maximum price, without responsibility or expense for the maintenance of the distribution system and the hydrants within the limits of those municipalities.

It is inconceivable that a court of equity can countenance such a scheme for defeating the will of the citizens of Omaha, discriminating unjustly against the inhabitants of adjacent communities, and defrauding the water company.

Therefore, on all grounds, there is the clearest warrant for the court to hold that the City of Omaha has ample statutory power to acquire, own and operate the system of water works now owned and operated by the Omaha Water Company, and which the mayor and city council have elected and determined to purchase.

POINT XI.

Upon the exercise of the option the obligation of the defendant to complete the purchase became absolute.

1. It appearing that the City of Omaha, with ample legislative authority, has duly exercised, through the ordinance of election, its right to purchase the system of water works operated by the Omaha Water Company; and the price to be paid having been duly ascertained through an appraisement, as provided in the ordinance of 1880, the city is legally bound to complete the purchase through payment of the price thus determined.

The nature of such an option and the effect of its exercise are conclusively set forth by the Circuit Court of Appeals for the Eighth Circuit in *Castle Creek Water Co. v. City of Aspen*, 146 Fed., 8, as follows:

“The stipulation regarding the sale of the works was an incidental part of the main agreement, and that agreement did not constitute a contract of sale of the water works.

Nevertheless, the agreement of the company that the city should have the option to purchase them at an appraised value was an inseparable part of this original contract. It was a continuing and irrevocable offer of the water company to sell. The notice given by the city that it would purchase upon the terms specified in this offer was an exercise of its option, and an irrevocable acceptance of the water company's offer. The city had but one option. When it had exercised it, its power to choose was exhausted. An election once made estops the elector. He may not revoke his choice and select another alternative. *The irrevocable offer and the irrevocable acceptance attested the meeting of the minds of the parties and constituted a contract of sale of the waterworks*" (p. 10).

The court cited the case of *Cherryvale Water Co. v. City of Cherryvale*, 65 Kan., 219; 69 Pac., 176, where, in passing upon the effect of the exercise of a similar option by the city, the court said:

"When the city elected, by giving the notice, a binding contract of purchase was consummated" (p. 230).

The court in that case further held that the city was bound to complete the purchase in spite of a material change in the condition of the water works pending their appraisement.

The court also cited the case of *Braintree Water Supply Co. v. Braintree*, 146 Mass., 482.

That was a case where the statute granting a franchise to the water company contained a provision for an option of purchase by the Town of Braintree, similar to that contained in Ordinance 423 of the City of Omaha. One of the terms of

that provision was that the option might be exercised by a vote of the town. Having once voted to purchase, the town subsequently assumed to revoke such vote. Thereupon, the company brought suit for the appointment of commissioners for determination of the price and completion of the contract of purchase.

This petition, denied in the court of first instance, was granted by the Supreme Court of Massachusetts, which held:

"The legislature conferred upon the company the corporate franchise, with a condition annexed in favor of the town. By accepting its charter, the corporation impliedly agreed to sell, whenever the town by vote should decide to buy. The legal relation of the parties was as if the corporation had made in writing a continuing offer to sell, at a price to be subsequently agreed upon by the parties, and in default of agreement to be fixed by commissioners. The vote of the town to buy was an acceptance of the offer, which completed the contract. The rights of the parties were then the same as if both had signed an executory contract, binding one to sell and the other to buy, at a price to be agreed between them, or determined under the statute. Neither party could then defeat the right of the other to have the contract executed. By the terms of the statute, it was to be specifically performed" (p. 486).

In the *City of Fayetteville v. Fayetteville Water, Light & Power Co.*, 135 Fed., 400, a similar view of the exercise of such an option was held. In that case the city had the right, at its option, to buy the company's plant at the end of ten years, with provision for the appointment by each party

of an appraiser who, with another selected by them, should fix the value of the property. The city in apt time and in due form, gave notice of its exercise of the option, and appraisers were appointed accordingly.

Upon objection to the appraiser appointed by the company, he retired and named a substitute who, with the other appraisers, agreed upon a valuation. The contention of the company in the suit by the city for specific performance, that the appraiser first appointed had no power of substitution was overruled, and a decree of specific performance was granted.

In the course of its opinion, the court said:

“Upon the exercise of this option the contract became, *eo instanti*, executed, and the sale was perfected” (p. 404).

2. It is begging the question for counsel for the City of Omaha to argue that the city has no power to purchase so much of the company's system of water works as lies in the adjacent municipalities, on the ground that the city has no power to levy taxes or issue bonds for such purchase. For, if the city has ample statutory power to purchase so much of the system of water works as lies in these neighboring municipalities, it has the same authority to levy taxes and issue bonds to pay therefor as it has to pay for what lies within the city limits.

Ralls County Court v. United States,
105 U. S. 733, 735, 736.

If the power to levy taxes and issue bonds be limited to the water works located wholly within the City of Omaha, and which are shown by the

record to compromise a complete pumping station with settling basins and a storage reservoir, it is difficult to perceive upon what consistent theory counsel for the city can claim that it has authority to levy taxes and issue bonds to pay for the pumping station at Florence and the supply main from that city to Omaha.

The question is not divisible on any reasonable theory, but is fundamentally and decisively a question of statutory authority to purchase, which has been fully demonstrated to have existed when the election to purchase was made.

3. The averment in the answer that, through the failure of the complainant to appoint an engineer to act as appraiser for a new appraisement at the instance of the water board, the company has now forfeited its right to insist upon a performance by the city of its election to purchase, states no ground of defense.

If the first appraisement is valid and binding upon the City of Omaha, any steps taken by the city in the direction of a second appraisement are, of course, immaterial and futile.

If the first appraisement was invalid and not binding upon the petitioner, judgment would necessarily go against the respondent, irrespective of any proceedings subsequent to the first appraisement.

Manifestly the provisions of the act of 1905 giving in terms to the water board "the acceptance or rejection of any award resulting from any such appraisement" could not, so far as this particular appraisement is concerned, clothe that body with a power which it did not possess when the election to purchase was made. Nor can ful-

filment of the contract of purchase, which became complete through that election, be prevented, or the obligation thus created be in any degree impaired, through any provisions of the act of 1905.

The language of the court in *Sala v. The City of New Orleans*, 2 Woods 188, may be taken as an appropriate comment upon such legislation:

"It seems to me clear, that after the thirty-five years from the passage of the charter have expired, and the city has, through its proper officers, elected to purchase the water works, an act of the legislature forbidding the issue of the bonds, or imposing onerous conditions upon their issue, not in force at the date of the charter of the bank, would be a direct and palpable invasion of the chartered privileges of the bank. As soon as the city made its election to purchase, the right of the bank to sell the water works became absolute. The state had agreed that under such circumstances the city should have power to purchase, and should purchase, and the bank should be compelled to sell, and should, in fact, have the right to sell, and should receive city bonds in payment, which bonds the city was authorized to issue. Any legislation which interfered with these powers and obligations, or any material terms thereof, the state was incompetent to pass" (pp. 194, 195).

POINT XII.

Through action taken by the water board of the City of Omaha since the record in this case was made up, and by the voters of the city, with respect to the acquisition of the water works in question, the pending proceeding for a review of the judgment below has ceased to have any legitimate merit or excuse.

1. Of such action it is submitted that this Court should take judicial notice within well established rules.

Thus, in *Equitable Life Assurance Society v. Brown*, 213 U. S., 25, this Court, in reviewing on certiorari a decision on a demurrer, held that, where a court of equity has jurisdiction of a case in which the defendant is in its nature a public institution, it is "proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant," and that, although certain facts so considered by this Court had happened since the filing of the bill, it was "not improper to refer to them, as they only constitute a history of the defendant since that time" (pp. 41, 42).

In *Wilson v. Shaw*, 204 U. S. 24, in a suit in which one purpose of the bill was to restrain the Secretary of the Treasury from paying specific sums named therein to the Panama Canal Company and to the Republic of Panama, this Court

had said that it would be sufficient to note the fact, of which the Court might take judicial notice, that those payments had been made.

In *Mills v. Green*, 159 U. S. 651, a suit in which a right to vote at the election of delegates to a constitutional convention was involved, this Court took judicial notice of the fact that, at the time the appeal was brought, the election had been held, and so dismissed the appeal.

In *Geist v. Detroit City Railway*, 91 Mich. 446, a personal injury case in which plaintiffs counsel in his address to the jury referred to the defendant as "driven through the street by the mob," the Supreme Court, on appeal, reversed a judgment for the plaintiff upon the ground that such remark of his counsel might well have had a very prejudicial effect upon the jury against the defendant, especially "in view of the great excitement and anger of the populace, which culminated in mob violence against this railway company but a few weeks before the trial, of which," said the court, "we cannot fail to take judicial notice as a matter of current history."

In *Sun Publishing Association v. The Mayor*, 8 App. Div., 230, the court took judicial notice of the difficulty experienced in raising private capital to build elevated railways in the City of New York, saying: "The court must take judicial notice of the city's history in this regard."

See also:

Wigg v. The Erie Railroad Company, 174 Fed. Rep., 401.

Connett v. United Hatters of North America, 74 Atl., 188.

Wigmore on Evidence, Vol. IV., sec. 2565.

The Supreme Court of Nebraska has adopted a liberal rule regarding judicial notice in *Foley v. The State*, 42 Neb., 233, where judicial notice was taken of a municipal ordinance, although it had not been pleaded, saying:

“We feel at liberty to adopt the rule most in harmony with the spirit of our liberal laws and most promotive of a prompt and efficient enforcement of municipal laws. The reason for the strict rule of the common law which requires every by-law, ordinance or private statute to be specially pleaded, cannot be said to exist under our system.”

2. Obviously action by the Omaha Water Board, embodied in a formal order, resolution or a declaration, falls within the same category as an ordinance of the City Council.

Such an order was adopted on the seventh day of April, 1909, and promulgated as follows:

“ORDER NO. 14.

It is hereby ordered and directed by the water board of the City of Omaha:

SEC. 1. That at the regular city election of the City of Omaha, to be held on the 4th day of May, 1909, the question and proposition of issuing bonds in the sum of six million five hundred thousand (\$6,500,000) dollars to be known as the Omaha Water Works bonds, the proceeds of which, in whole or in part as may be necessary, to be used for the purpose of the purchase and extension of the water works, or any part thereof, belonging to the Omaha Water Works Company, shall be and is hereby authorized and ordered to be submitted to the electors of said city at the said election.

The said bonds shall be of the denomination of one thousand (\$1,000.00) dollars each, with interest coupons thereto attached, and known as Omaha Water bonds to bear interest at the rate of four (4) per cent. per annum, payable in thirty years from the date of their execution, with interest payable at Kountze Bros., bankers, New York City, semi-annually, on the first days of January and July of each year.

Sec. 2. That the question and proposition shall be submitted in the following form:

'Shall the City of Omaha issue six millions five hundred thousand (\$6,500,000) dollars of four (4) per cent. coupon semi-annual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the city with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the water board of the City of Omaha, may be made for such purpose.'

Sec. 3. The mayor of the City of Omaha is hereby authorized and directed to issue a proclamation setting forth in full said question and proposition in accordance with the law, at least twenty (20) days prior to the date of said election, which said proclamation shall be published in the official newspaper of the said city twenty (20) days prior to the date of said election.

Sec. 4. The city clerk of the City of Omaha is hereby authorized and directed to prepare sample and official ballots in accordance with the above and foregoing order and to distribute same according to law to each of the said voting precincts in the City of Omaha at the said election.

The above described question and proposition shall be printed upon said ballots and thereunder shall be printed in separate lines the words, 'Yes,' 'No,' and following each of said words upon the same line therewith shall

be printed a square wherein the electors shall vote upon said question and proposition by making a cross. A cross placed in the square following the word 'Yes' shall be a vote in favor of said question and proposition, and a cross placed in the square following the word 'No' shall be a vote against said question and proposition; provided, however, that if voting machines shall be used at said election, the city clerk shall not print the official ballots, but shall prepare the statement of the question and proposition submitted to be inserted on the ballot label for questions on said voting machines with words 'Yes' and 'No' for the voter, and it shall be sufficient to print on said ballot label the following—'Shall the city issue \$6,500,000 of water bonds running thirty years at 4 per cent?'

Sec. 5. For the payment of the principal and interest of said Omaha Water Works bonds the full faith, credit, property and revenues of the City of Omaha shall be and are hereby pledged."

MILTON T. BARLOW,
Chairman of Water Board.

ARNOLD C. KOENIG,
Secretary of Water Board.

I hereby certify that this is a true copy of Water Board Order No. 14.

ARNOLD C. KOENIG,
Secretary.

This was duly followed by the election proclamation by the mayor, as required by the order.

The proclamation was followed by an appeal to the people of Omaha, signed by all the members of the water board and published in the newspapers of the city in April and May, 1909, urging the people to vote for the water bonds and giving the reasons of the water board for so urging, as follows:

“WATER BONDS

WHY THEY SHOULD CARRY.

TO THE PEOPLE OF OMAHA:

Many questions are being asked in regard to the proposition to vote \$6,500,000 of water bonds of the city.

We deem it proper that the public should know the reasons why we urge the people of Omaha to vote for the water bonds:

First.—We believe municipal ownership to be the best solution of the situation; that it will result in better water service, more prompt extension of water mains and in reduction of water rates without increasing taxes. There can be no municipal ownership without voting bonds.

Second.—We believe the plant will sustain itself—paying interest on bonds, cost of operation, and create a sinking fund to pay off the bonds without additional taxes.

IN OTHER WORDS, WE BELIEVE WE WILL BE BUYING A REVENUE PRODUCING PROPERTY WHICH WILL CARRY ITSELF.

Third.—We cannot and will not use the \$3,000,000 of bonds heretofore voted.

Fourth.—It is important that the bonds be voted now that the water board may be in position to make immediate compromise of the litigation, if this is possible.

Fifth.—If immediate compromise cannot be made, it is equally important that the bonds be voted, that the water board be in position to pay the amount found due by the United States Supreme Court.

Sixth.—We do not intend to nor will we pay the amount of the award (\$6,263,000) unless compelled to do so by the decree of the Supreme Court, where the matter is now pending.

Seventh.—We will not compromise unless upon a substantial reduction of the amount as found by the award. We will try to compromise the matter immediately if the bonds are voted.

Eighth.—We are not in position to make any compromise until the issue of bonds shall be authorized by vote of the people. In previous attempts to compromise we have been met with the statement that we were in no shape to carry out our proposition until bonds were voted.

Ninth.—We do not believe in granting a franchise to the water company, nor to any Omaha syndicate. If it is a good proposition for a syndicate to take hold of, it is a better thing for the city to handle for its own people.

Tenth.—If the bonds are voted, they will not be issued, nor will they bear interest, until the water works are acquired by the city.

Eleventh.—No more of said bonds will in any case be issued than are actually necessary for the acquisition of the plant.

Twelfth.—Should the decision of the supreme court be against the city, a decree will be entered which must be paid. The city cannot avoid the payment of such judgment by refusing to vote bonds. The judgment would be enforced by a levy of taxes on the property of the citizens. If the bonds are voted, the judgment can be paid by the proceeds of the bonds, and the interest and expense of running the water works will be paid out of the revenues derived from the sale of water, without additional taxes on the property of the city.

THIRTEENTH.—IT MUST BE REMEMBERED THAT THE VALUATION, \$6,263,000, INCLUDES THE WHOLE PLANT OF THE WATER COMPANY IN THE CITY OF OMAHA, SOUTH OMAHA, FLORENCE AND DUNDEE, AND NOT MERELY THE PORTION PERTAINING TO THE CITY OF OMAHA. THE BONDS FOR \$3,000,000, HERETOFORE VOTED, CONCERNED ALONE THE PORTION OF THE PLANT IN THE CITY OF OMAHA AND THE PUMPING STATION IN FLORENCE.

Fourteenth.—The voting of these bonds will defeat the effort of the Omaha Water Company and the Omaha syndicate to secure

a franchise, and will secure municipal ownership for the people at the earliest date possible.

These are a few of the reasons why we unanimously urge the voting of these bonds.

We have given the matter our best consideration and believe good business judgment dictates the approval of the bonds.

MILTON B. BARLOW,
ISAAC E. CONGDON,
A. H. HIPPLE,
R. B. HOWELL,
CHARLES R. SHERMAN,
D. J. O'BRIEN.

The Omaha Water Board."

This appeal is a part of the current city history since the record in this case was made up.

At the regular annual city election held May 4, 1909, the proposition to issue the water works bonds to the amount of \$6,500,000 for the purchase of the system of water works operated by the Omaha Water Company, was carried by 9848 votes in favor of the issue against 4137 votes in opposition to the issue, as appears from the record of the City Council, Journal A-75, p. 5, as follows:

"COUNCIL CHAMBER.

May 10, 1909.

1690.

REPORT OF CANVASSERS:

We, the undersigned, Dan B. Butler, City Clerk, and Otto J. Bauman and Arthur B. Grotte, two disinterested electors of the City of Omaha, appointed by the Council to canvass the returns of the votes cast at the election held on Tuesday, May 4, 1909, for the questions submitted to the vote of the people:

'Shall the City of Omaha issue Six million Five Hundred Thousand (\$6,500,000.) Dollars, four (4) per cent. coupon semi-an-

nual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?' * * *

FOR QUESTION AND PROPOSITION OF ISSUING OMAHA WATER WORKS BONDS: Shall the city of Omaha issue Six Million Five Hundred Thousand (\$6,500,000) Dollars, four (4) per cent. Coupon semi-annual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

Yes. 9848

No. 4137

All of which is respectfully submitted.

DAN B. BUTLER,	}	Canvassers.
City Clerk		
OTTO J. BAUMAN,		
A. B. GROTE,		

Motion by Mr. Zimman, that the report be adopted.

Carried: The report was adopted.

Yeas: Bridges, Brucker, Elsasser, Hansen, Jackson, McGovern, Sheldon, Zimman, Mr. President. 9

Nays: 0

Absent: Davis, Endres, Funkhauser. 3

FROM L. B. JOHNSON, PRESIDENT CITY COUNCIL.

As president of the City Council of the City of Omaha, I hereby declare that the fol-

a franchise, and will secure municipal ownership for the people at the earliest date possible.

These are a few of the reasons why we unanimously urge the voting of these bonds.

We have given the matter our best consideration and believe good business judgment dictates the approval of the bonds.

MILTON B. BARLOW,
ISAAC E. CONGDON,
A. H. HIPPLE,
R. B. HOWELL,
CHARLES R. SHERMAN,
D. J. O'BRIEN.

The Omaha Water Board."

This appeal is a part of the current city history since the record in this case was made up.

At the regular annual city election held May 4, 1909, the proposition to issue the water works bonds to the amount of \$6,500,000 for the purchase of the system of water works operated by the Omaha Water Company, was carried by 9848 votes in favor of the issue against 4137 votes in opposition to the issue, as appears from the record of the City Council, Journal A-75, p. 5, as follows:

"COUNCIL CHAMBER.

May 10, 1909.

1690.

REPORT OF CANVASSERS:

We, the undersigned, Dan B. Butler, City Clerk, and Otto J. Bauman and Arthur B. Grotte, two disinterested electors of the City of Omaha, appointed by the Council to canvass the returns of the votes cast at the election held on Tuesday, May 4, 1909, for the questions submitted to the vote of the people:

'Shall the City of Omaha issue Six million Five Hundred Thousand (\$6,500,000.) Dollars, four (4) per cent. coupon semi-an-

nual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

FOR QUESTION AND PROPOSITION OF ISSUING OMAHA WATER WORKS BONDS: Shall the city of Omaha issue Six Million Five Hundred Thousand (\$6,500,000) Dollars, four (4) per cent. Coupon semi-annual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

Yes. 9848

No. 4137

All of which is respectfully submitted.

DAN B. BUTLER,	} Canvassers.
City Clerk	
OTTO J. BAUMAN,	
A. B. GROTE,	

Motion by Mr. Zimman, that the report be adopted.

Carried: The report was adopted.

Yeas: Bridges, Brucker, Elsasser, Hansen, Jackson, McGovern, Sheldon, Zimman, Mr. President. 9

Nays: 0

Absent: Davis, Endres, Funkhauser. 3

FROM L. B. JOHNSON, PRESIDENT CITY COUNCIL.

As president of the City Council of the City of Omaha, I hereby declare that the fol-

lowing question and proposition regarding the issue of Water Works Bonds in the sum of \$6,500,000.00 has been duly carried, to-wit:

'Shall the City of Omaha issue Six Million Five Hundred Thousand (\$6,500,000) Dollars four (4) per cent. Coupon semi-annuals interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

And I declare that the issuance of said bonds has been authorized by the required majority vote of the legal electors of the City of Omaha.

Omaha, Nebraska, May 10, 1909.

Motion by Mr. Zimman, that the report be adopted.

Carried: The report was adopted.

Yeas: Bridges, Brucker, Elsasser, Hansen, Jackson, McGovern, Sheldon, Zimman, Mr. President. 9

Nays: 0

Absent: Davis, Endres, Funkhauser, 3

On motion by Mr. Elsasser, the Council adjourned.

DAN B. BUTLER,
City Clerk."

The result of the vote was duly certified to the water board, as appears from the minutes of a meeting held June 14, 1909, as follows:

"The Secretary presented a certified copy of that portion of the report of the Committee (consisting of the City Clerk and two disinterested electors) of the City of Omaha appointed by the council to canvass the returns of the votes cast at the election held on Tues-

day May 4th, 1909, for the various bond propositions submitted to the vote of the people, which relates to the canvass of the votes on the question of issuing \$6,500,000 Omaha Water Works bonds. Said abstract from said general report is certified to by the City Clerk and shows the following result:

'Yes=9849 votes.

'No=4137 “

5711 votes majority in favor of bonds.

ARNOLD C. KOENIG,
Secretary.

Approved July 7, 1909.”

The circumstances of this vote are all matters of which this Court can take judicial notice.

The provisions of the Nebraska statutes with regard to the issue of water bonds are set forth in the appendix to this brief.

The respondent files with the clerk of this court verified copies of the order, proclamation, appeal, and record of the return of the canvassers.

From all this certain things are clear.

Foremost, it appears that the assignments of error to the effect that the Circuit Court of Appeals erred in holding that the election to purchase included all the properties of the water works system, and in holding that the City of Omaha had corporate authority to purchase that part of the system extended into adjacent municipalities (Petition for certiorari, pp. 8 and 9), were not declared in good faith for the purpose of either relieving the city of an unauthorized purchase or limiting the scope of the purchase.

As already pointed out, there has never been any official withdrawal from the election to purchase the system as an entirety, nor any official

declaration that the scope of the purchase was intended to be limited to that part of the water works used only for supplying the City of Omaha; but now we find the water board urging the issue of bonds for the purchase of "the whole plant of the water company in the City of Omaha, South Omaha, Florence and Dundee, and not merely the portion pertaining to the City of Omaha."

Therefore, it is manifest that these assignments of error have been injected into the case by counsel for the city as chance grounds of reversal, doubtless with a view, in case of reversal, to another enabling act of the Nebraska legislature, after a "compromise," or to the possibility of a construction by the Supreme Court of Nebraska favorable to the present existence of ample statutory authority for the full purchase.

It also appears that more than two-thirds of the voters of the city interested in the question were not only in favor of the purchase of the entire system, but were willing to vote bonds enough to pay the price fixed by the appraisement.

It follows, and is virtually avowed by the water board, that the sole purpose of continuing the effort of the city toward a review of the decision of the Circuit Court of Appeals, is to obtain, if possible, a reversal on technicalities, and thus get a chance of forcing the water company to accept "a substantial reduction of the amount as found by the award." This purpose continues, notwithstanding the public announcement by all the members of the water board, over their own signatures that at the price fixed by the appraisement, they "believe the plant will sustain itself—paying interest on bonds, cost of operation, and create a sinking fund to pay off the bonds with-

out additional taxes;" that "in other words" they believe the city "will be buying a revenue producing property which will carry itself."

The appeal to the voters goes on to declare that it "is important that the bonds be voted, that the water board be in a position to pay the amount found due by the United States Supreme Court"—as if a question of valuation were before this Court. Certainly that appeal conveys the impression, and evidently was meant to convey the impression, that the City of Omaha looks to this Court for a reduction of the price of the water works fixed by the appraisalment. But the question of the value of the water works system is not before this Court through any assignment of error or in any other possible way. Neither in the present case nor in the appraisalment proceedings was any testimony respecting values given by either side on which a court could base even an opinion. Nor is there any evidence whatever of any excess in the valuation found by the appraisers.

Even if there were a question of value in the case, it would afford no ground of reversal, upon the facts surrounding this appraisal. For, as said in *N. E. Trust Co. v. Abbott*, 162 Mass., 148,

"It is well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced."

There remains then to counsel for the city the forlorn hope of a reversal, either upon insincere

assignments of error below in holding that the city has statutory authority to make a purchase which it has unequivocally elected to make and which its water board declares to be advisable and which its voters have provided the means to complete, or upon mere technicalities, neither of which is claimed to have worked in any degree whatever to the city's prejudice. It is impossible to conceive that this Court will overthrow, upon such technicalities, an appraisalment by engineers of high eminence and unquestionable probity, who are shown not to have failed in any respect to make a fair valuation, but who have made a valuation at which, in the opinion of the water board, the city "will be buying a revenue producing property" and who, by the unanimous opinion of the court below, are held to have administered in every way substantial justice.

POINT XIII.

No valid equitable considerations have been suggested why a decree of specific performance should not be entered as directed by the Circuit Court of Appeals.

Whether or not the objections to such decree interposed by counsel for the city, apart from any assignments of error, will be considered by this Court, they suggest no substantial reasons why the decree of the Circuit Court of Appeals should not be affirmed.

1. From the nature of the case, the revision of the inventory of materials on hand, in accordance

with the report of the appraisers, is not only proper but necessary to a final adjustment in connection with any questions of additions, improvements, interest and accounting that may arise when the court comes to enter its final decree.

As said in the opinion of the Circuit Court of Appeals,

“What the parties cannot agree upon, the trial court has full power to determine according to principles of right and justice.” (162 Fed. R., p. 241).

2. The deed tendered, which conveys the contract rights of the water company with respect to supplying water to the communities adjacent to the City of Omaha, properly makes the conveyance subject to the contract obligations of the water company.

Under the circumstances of this purchase, no covenants of warranty can be required, nor are they needed any more than in a case of acquisition of property through condemnation.

The two mortgages of the water company form no obstacle to the complete acquisition of the water works by the city, and, upon completion of the purchase through payment of the purchase price, necessarily cease to be a lien upon the property. They cover in terms no more than the city has in terms elected to purchase. If, therefore, the decree below be affirmed, the rights of the bondholders in respect to the outlying properties are subject to the election of the City of Omaha to purchase those properties.

The statement in the brief of counsel for the city (p. 72) that “if the Court should enter a decree as prayed, the city would pay to the water company \$6,263,295.49, and would obtain nothing therefor but an *equity* in the property of *no value*,

because the mortgage obligation exceeds the purchase price," has no foundation either in law or in fact.

As matter of law, the underlying right of purchase reserved to the city in the original ordinance of 1880, necessarily insured to the city complete title to the water works upon exercise of the option and payment of the purchase price. Otherwise, this reserved right could have been nullified by mortgaging the property up to its full value.

Not only so, but the two mortgages of the Omaha Water Company expressly recite and recognize the ordinance of 1880, as an underlying source of title, and the bondholders must be held to have taken their bonds subject to the exercise of the reserved right of purchase. (Record, pp. 203, 220).

As matter of fact, the mortgage obligations do not and cannot exceed the purchase price of \$6,263,295.49, because the amount of bonds at any time outstanding under both mortgages cannot exceed \$6,000,000.

Thus, the prior lien mortgage provided for an issue of bonds limited to the aggregate amount of \$1,500,000. Of these, bonds to the amount of \$440,000 could only be issued to take up underlying bonds outstanding to the amount of \$400,000. (Record, pp. 200, 205).

The consolidated mortgage provided for an issue of bonds limited to the aggregate amount of \$6,000,000. Of these, bonds to the amount of \$1,750,000 could be issued only to take up the prior lien bonds to the amount of \$1,500,000. Of the remaining bonds, amounting to \$4,250,000, bonds to the amount of \$3,600,000 were to be issued towards payment for the property and bonds to the amount

of \$650,000 were to be reserved for enlargement and improvement of the property (Record, p. 222).

Thus, under no circumstances, could there be outstanding mortgage bonds of the water company to an amount in excess of \$6,000,000.

Even if the question of title raised by the city were valid, the court could provide for the payment of the outstanding bonds, which are less in amount than the purchase price, out of the proceeds of sale, the bonds being subject to redemption at 105.

As said in *Guild v. Railroad Company*, 57 Kansas, 70:

“Where an incumbrance can be removed merely by the application of the purchase money, and the court is able to provide for the conveyance of a clear title to the vendee, the mere fact that incumbrances exist which the plaintiff has not removed, or even is unable to remove without the application of the purchase money, for that purpose, will not prevent a decree for a specific performance.” (p. 77).

A determination of all questions of this description may properly be made by the Circuit Court, facilitated perhaps by the presence in the case of the trustees of the two mortgages, as suggested by the Circuit Court of Appeals.

3. The answer admits that a deed was tendered, as set forth in the record, purporting to convey all of the system of the water works of the complainant company, including the parts thereof located within the municipalities adjacent to the city of Omaha. While the answer avers that the defendant has no knowledge upon which to base a

belief as to whether the deed was good and sufficient, or properly executed, or in due form, it does not make any specific exception to the deed, further than to aver that the defendant was without authority to receive or accept of a deed conveying to it the properties lying within or necessary or appurtenant to the supplying of water to South Omaha, Dundee, Florence and the East Omaha Land Company, and that the City of Omaha was without authority in law to pay for said properties, or contract an obligation to pay for the same.

The answer further admits that the city has not paid, but still refuses to pay, the amount of the appraisalment.

The evidence in the case, including the deed itself, proves that it was good and sufficient and properly executed, and in due form and properly tendered.

Whether or not that was so, the court can decree a specific performance upon the execution and delivery of such a deed as the court shall approve.

*Kentucky Distilleries & Warehouse
Co. v. Blanton*, 149 Fed., 31.

4. It is too clear for argument that any authority given in terms by the act of 1905, to the water board to reject an award resulting from an appraisalment, could not extend to the appraisalment which, through the exercise by the city, in 1903, of the option to purchase, became a part of the irrevocable contract thus made.

5. While it is not questioned that a decree of specific performance is not always a matter of ab-

solute right, it is submitted that no court has ever refused such relief in a case where a party is under a plain contract to purchase a property at a price at which the purchaser avers that it "will be buying a revenue producing property which will carry itself" and "create a sinking fund to pay off the bonds" to be issued therefor.

6. The suggestion of counsel for the city that a judgment be entered setting aside the appraisal and remanding the case to the Circuit Court to proceed in a judicial manner to ascertain the value of the water works, could not in any view of this case be entertained.

The city's right to purchase under the ordinance of 1880 provided explicitly that the purchase price should be ascertained through an appraisal by selected engineers, and no court can make a new contract for the parties or substitute any other method of appraisal, except upon deliberate repudiation of that method by the parties themselves. The case of *Castle Creek Water Company v. City of Aspen*, 146 Fed., 8, goes no further than to hold that specific performance of an absolute contract of purchase cannot be defeated by the refusal of one of the parties to join in the appointment of appraisers.

POINT XIV.

The appraisement being in all respects valid and the city's contract to complete the purchase being absolute, the judgment of the Circuit Court of Appeals should be affirmed with costs.

HOWARD MANSFIELD,
R. S. HALL,
HERBERT C. LAKIN,
Of Counsel for Respondent.

HOWARD MANSFIELD,
Solicitor for Respondent.

Appendix.

The following portions of Statutes of the State of Nebraska cited in the foregoing brief are printed under the Rule.

ACT OF 1879.

“An Act Entitled ‘An Act to amend Section Fifteen (15) of an Act entitled “An Act to incorporate cities of the First Class”,’ approved March 28, 1873 (General Laws of 1879, p. 95).

“Be it enacted by the Legislature of the State of Nebraska:

“That Section fifteen (15) Chapter eight (8) of the general statutes of Nebraska, entitled ‘An Act to incorporate cities of the first class’, approved March 28, 1873, be amended so as to read as follows:

“Section 15. The mayor and council of each city created or governed by this act shall have the care, management and control of the city and its property and finances, and shall have power to pass any and all ordinances not repugnant to the constitution and laws of this State, and such ordinances to alter, modify or repeal, and shall have power: * * *

“28th. To erect construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such water-works, and to do all acts necessary for the construction, completion, management and control of the same * * * and the mayor and council of each city created or governed by said

act shall have power to contract with and to procure individuals or incorporations to construct and maintain water-works on such terms and under such regulations as may be agreed on" (p. 99).

CHARTER OF OMAHA PRIOR TO LEGISLATION OF 1903.

Chapter 12-a, Nebraska Compiled Statutes, 1901.

"Sec. 27. The mayor and council shall have power to provide for keeping the sidewalks clean and free from obstructions and accumulations and may provide for the assessment and collections of taxes on real estate, and for the sale and conveyance thereof to pay the expenses of keeping the sidewalk adjacent to such real estate clean and free from obstructions and accumulations, as herein provided. To provide for the planting and protection of shade or ornamental and useful trees, and for the protection of birds, their nests and eggs. To provide for, regulate and require the numbering and renumbering of houses along public streets or avenues; to care for and control, to name and rename streets, avenues, parks and squares within the city, to provide for the opening, vacating, widening and narrowing of streets, avenues and alleys within the city, under such restrictions and regulations as may be provided by law. *Provided*, That no street or avenue shall be narrowed to a width of less than sixty-six feet, except on petition of two-thirds of the owners of the lots and real estate along that portion of the street or avenue narrowed. To appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, elec-

tric light plants or water works, including mains, pipe lines, and settling basins therefor, the right and power to appropriate private property for sewers, parks, parkways, boulevards, electric light plants and water works, to extend for a distance of ten miles from the corporate limits of the city; they shall also have power to appropriate any water works system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises to own and operate the same, if any. All cities of the metropolitan class, upon condemning private property under such authority, shall cause to be recorded an accurate plat and a clear, definite description of the property so taken in the office of the register of deeds of the county within which such city is located, within sixty days after the other legal steps for the acquisition of such title shall have been taken."

"Sec. 101-b. In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and council a system of public parks, parkways

and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or ground so designated, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated or purchased or hereinafter provided, assess such real estate as may be specially benefited by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessment. And the mayor and council are further authorized upon the recommendation of said park commissioners and with their concurrence to purchase in the name of said city, lands, lots or grounds within the limits herein designated to be used and improved for parks, parkways or boulevards, notwithstanding said limits include lands, lots or grounds within the corporate boundaries of other cities or villages, and if such lands, lots or grounds are in the limits of other cities or villages, said cities or villages shall cease to have jurisdiction over the said lands, lots or grounds after the said lands, lots or grounds are acquired for parks, parkways or boulevards as aforesaid by gift, purchase, condemnation or otherwise; and for the purpose of paying for and improving land, lots or grounds purchased or appropriated for parks, parkways or boulevards, the mayor and council may issue bonds

for such purpose to an amount necessary, not to exceed fifty thousand (\$50,000) dollars per year, said bonds to be designated and known as "Park Bonds, Series * * *," and to be issued and used in accordance with the provisions governing the issuance of sewer, funding, and other public improvements bonds by this act contemplated. Provided, no such bonds shall be issued until the question of the issuing of the same has been submitted to the electors of the city at a general or special election therein, and authorized by a vote of two-thirds ($2/3$) of the electors voting on said question at such election. When improvements are made upon or in streets, or sidewalks adjacent to, and abutting upon, parks, parkways or boulevards and similar grounds in the charge control of said park commissioners, the cost or expense of which would otherwise be chargeable to the city, the same shall be paid from the park fund tax herein provided; and said commissioners are hereby directed to pay the cost of such improvements. Said board of park commissioners shall be composed of five members, who shall be resident freeholders of such city, and who shall be appointed by the judges of the district court of the judicial district in which such city shall be situated. The members of said board shall be appointed by said judges, a majority of said judges concurring, but the members of said board heretofore appointed and now acting shall hold their office for the full time for which they were appointed under the law heretofore enforced, and vacancies occurring from expiration of their term shall be filled by further appointments by said judges for the term of five years; it shall be the duty of said judges, a majority concurring, to ap-

point or reappoint, one of said board each year on the second Tuesday of May, and to fill for the unexpired term any vacancies existing in the board. A majority of all the members of the board of park commissioners shall constitute a quorum. It shall be the duty of said board of park commissioners to lay out, improve and beautify all lands, lots or grounds now owned, or hereafter acquired for parks, parkways or boulevards. They may employ a secretary and such landscape gardeners, superintendents, engineers, keepers, assistants or laborers, that may be necessary for the proper care and maintenance of such park, parkways or boulevards, or the improvements or beautifying thereof, to the extent that funds may be provided for such purpose. The members of said board at its first meeting each year after the first Tuesday in May shall elect one of their own members as chairman of said board. Before entering upon their duties each member of said board shall take an oath to be filed with the city clerk, that he will faithfully perform the duties of his appointment and in the selection or designation of lands, lots or grounds for parks, parkways or boulevards, and in making appointments he will act for the best interests of such city and the public, and will not in any manner be actuated or influenced by personal or political motives. The members of said board shall receive no compensation and serve without cost to the city."

"Sec. 135. The mayor and council shall have power to erect, construct, purchase, maintain and operate subways and conduits, water works, gas works and electric light plants, either within or without the corporate limits of the city, and shall have power to fix, charge and collect a ren-

tal or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen."

LAWS OF NEBRASKA, 1903, CHAPTER 12.

A Bill For

An Act to provide in cities of the metropolitan class, viz.:

1. For the procedure in certain cases, by the mayor and council in the acquisition of a municipal water plant:
2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees.

3. Penalties for interference with water plant, or employees of water board in the discharge of their duties:

4. For a Water Fund, its revenues, and the disbursement and application thereof:

And amending Sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled "An Act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An Act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government.' " approved March 30, 1887, and all acts amendatory thereof, being Chapter 12a of the Seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895), entitled 'Cities of the Metropolitan Class,' approved March 15, 1897, being Chapter 12a of the Tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled "The Compiled Statutes of the State of Nebraska, 1881 (Tenth edition), with amendments 1882 to 1901, comprising all the laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, and repealing said original sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE
OF NEBRASKA:

Section 1. (Bonds for Construction or Purchase of Water Plant.) In any city of the met-

ropolitan class which has heretofore voted or may hereafter vote bonds for the construction or purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall within thirty (30) days after the election at which such bonds are or have been voted, or in case such bonds have been heretofore voted, then within thirty (30) days after this act shall take effect, declare by ordinance that it is necessary and expedient for such city to construct or purchase, as the case may be, a system of water works.

Sec. 3. (Method of Purchasing.) In case bonds are or have been heretofore voted for the purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall, beginning at the first meeting of the council after the approval of said ordinance, proceed to take the necessary steps to acquire such water plant under the powers granted by the charter of such city, or by virtue of any rights inuring to such city through contract or otherwise; and if at any stage of the proceedings instituted to acquire such water plant, the mayor and council shall, unduly or unreasonably delay, then and in such case, said mayor and council may be compelled to act by mandamus at suit of the water board of such city; and, further, if at any stage of the proceedings it shall be ascertained that the bonds hereafter or heretofore voted for the construction or purchase of said water plant are inadequate in amount, then, it shall be the duty of the mayor and council, and mandatory thereon, to submit to the voters of such city, in the manner prescribed by law, a proposition for the issuance of bonds in such further amount as may be

necessary for the construction or purchase of such water plant, as the case may be.

Sec. 4. (Appraisement.) If the method of procedure adopted by the mayor and council for the acquisition of such water plant shall involve the appointment of one or more appraisers by the council, or by the mayor and council, then, and in such case, it shall be the duty of the mayor and council to at once notify the water board stating the number of appraisers to be appointed. Upon receipt of such notification the water board shall propose for appointment, by the council, or by the mayor and council, as the case may be, at the time of the next regular meeting of said council, the names of as many appraisers as may be indicated in said notification. And it shall be the duty of the council, or the mayor and council, as the case may be, to appoint or reject, at the time of such meeting, the appraiser or appraisers so proposed by said board. In case of rejection of all or any one of the appraisers proposed, as herein provided, it shall be the duty of the water board, at the time of every regular meeting of the council thereafter, to propose another or other appraisers for appointment, and so to continue until the full number of appraisers shall have been appointed by the council, or by the mayor and council, as the case may be. No such appraiser or appraisers shall be appointed by the council, or by the mayor and council, unless such appraiser or appraisers shall have been first proposed by said water board neither shall any appraisement of said water plant be submitted to the people of such city for ratification or rejection unless the same shall have been, also, first approved by said board. If the

method of procedure adopted by the mayor and council for the acquisition of such water plant shall involve, by reason of contract, the appointment of any appraiser or appraisers by the corporation, partnership, or individual or individuals owning such water plant, and the said corporation, partnership, individual or individuals shall, for thirty (30) days after such appointment of an appraiser or appraisers should, under the contract, have been made, fail to appoint such appraiser or appraisers, then in such case, the water board, representing the rights of the city in the premises, shall have authority, and it shall be their duty, to bring appropriate proceedings in the district court of the county in which such city is located to compel the said owner or owners of such water plant to appoint such appraiser, or appraisers, or upon their failure then so to do, to have such appraiser or appraisers appointed in their behalf by the court or judge before whom such action is brought. Such action both in the district court and in the supreme court, if such action shall be taken to the supreme court, on appeal or writ of error, shall take precedence for trial over all other cases on the dockets of such courts and be advanced for hearing as soon as at issue.

Sec. 5. (Election of Water Board.) In each city of the metropolitan class owning and operating a municipal water plant, or which has heretofore voted or may hereafter vote bonds for the construction or purchase of a municipal water plant, there shall be a water board consisting of six (6), two of whom shall be elected at the time of each general state election held in the even

numbered years, one from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election. Members of said board shall hold office for a period of six (6) years from the first Tuesday after the first Monday of January following their election, and until their successors shall be elected and qualified; provided, however, that the members of the first board shall be appointed in such manner and for such terms as hereinafter set forth.

Sec. 6. (Appointment of First Water Board.) The Governor shall appoint the members of the first water board, all of whom shall be electors of such city, two to serve from the date of their appointment for four years, and two from the date of their appointment for two years, from the first Tuesday after the first Monday of January following the general election held in the even numbered years, next after their appointment; and two to serve until said first Tuesday after the first Monday following the general election held in the even numbered years, next after their appointment. One member for each term herein designated, shall be appointed from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election. Such appointments shall be made within thirty (30) days after the election at which bonds shall have been voted for the construction or purchase of a municipal water plant, or if such bonds have been heretofore voted, or if such city has heretofore acquired a municipal water plant, then within thirty (30) days after this act shall take effect.

Sec. 10 (Powers of Board.) The water board shall have general charge, supervision, and control of the design, construction, operation, maintenance and extension or improvement of any water plant owned and operated by such city, including the power to purchase and contract for necessary material, labor and supplies, and this power shall not be subject to the approval or action of the mayor and city council; but no new construction or extension of such water plant shall be undertaken, involving the expenditure of more than five hundred dollars (\$500) without the approval of the mayor and council, neither shall any extension or improvement of such water plant be undertaken without the approval of said board; provided, that nothing herein contained shall be construed as prohibiting said board from preparing or providing engineering plans and specifications, for any such proposed construction, extension or improvement, or for the purpose of making any estimates which said board may deem necessary, without such approval. The authority and powers herein conferred upon the water board shall extend as far beyond the corporate limits of said city as said board may deem necessary, not to exceed ten (10) miles.

Sec. 12 (Water Rates and Service Fees).—It shall be the duty of the water board and the water board shall be charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service, or the sale of water; provided, that all payments on account of water service, or the sale of water, and all other receipts of the board from whatever source, shall be received and receipted for by the city treasurer, or by an em-

ployee of the city treasurer's office, who shall be assigned by said treasurer for such purpose. The water board shall have authority to make such rules and regulations for the conduct of the water plant, and the use and measurement of water supplied therefrom as it may deem proper, and shall also have authority to cut off any water service for non-payment or non-compliance, on the part of the water user, with the rules and regulations adopted by the board for the conduct of its business and affairs.

Sec. 14. (Interfering with Plant or Employee).—Any person who shall wilfully interfere with or obstruct an employee of the water board in the discharge of his duties, or who shall wilfully tamper with or injure such water plant, or the pipes connected therewith, shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be punished by a fine of not over one hundred dollars (\$100.00), or imprisonment in the county jail not over sixty (60) days, or both such fine and imprisonment in the discretion of the court.

Sec. 18 (Water Fund, Levy, Etc.).—The water fund shall consist of all moneys received on account of the water plant for water service or otherwise, together with a water tax to be levied—in lieu of the “fund for paying water rented for fire purposes and for public use”—by the mayor and council, at the same time, and as in the case of other funds provided for city purposes under the provisions of the charter of such city, the amount of said tax to be certified to the mayor and city council by the water board on or before the second Tuesday in January in each year, and

not to exceed the sum of one hundred thousand dollars (\$100,000), and it shall be mandatory upon the mayor and council to levy the same as above provided. Such fund, together with any interest received thereon, shall be used only for the purpose of paying interest on any water bonds issued by the city, the cost of operation, maintenance and extension or improvement of the water plant, and the salaries and expenses of the water board, its employees and assistants as herein provided. The balance remaining in the water fund at the end of each year shall be placed in a sinking fund, provided for the payment of any outstanding water bonds of such city, or for extraordinary improvements of the water plant.

Sec. 19 (Sections Amended).—That sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled “An act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled ‘An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,’ approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled ‘Cities of the Metropolitan Class,’ approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled “The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H.

Wheeler," and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, be and the same are hereby amended to read as follows:

Sec. 135. (Duties of Council.)—The Mayor and council shall have power to erect, construct, purchase, maintain and operate subways or conduits, water works, gas works and electric light plants either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen. (Water Board Paramount.) Provided, that nothing in this section contained shall be so construed as to interfere with the powers, duties, authority and privileges, conferred and imposed upon the water board as prescribed by law, but in all matters relating to

the purchase, construction, maintenance and management of a water works plant for such city or in any way appertaining thereto, the said powers, duties, authority and privileges of such water board so far as elsewhere conferred, imposed and defined by law shall be exclusive and paramount.

Sec. 20. (Repealing Clause.) That said sections, 16, 24, 25, 29, 32, 33, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of said act entitled "An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government", and to repeal an act entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895), entitled "Cities of the Metropolitan Class," approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901) entitled "The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler", and certified to by Hiland H. Wheeler, Compiler of date July 1, 1901, as heretofore existing be and the same are hereby repealed.

Sec. 22. (Emergency Clause.) Whereas an emergency exists this act shall be of full force and effect from and after its passage and approval.

Approved February 2, 1903.

Nebraska Act of 1905.

A new edition of the Compiled Statutes of Nebraska was issued in 1907, comprising all laws of a general nature in force on July 5, 1907.

Chap. 12a of that edition relates to cities of the metropolitan class, and includes an act of the Legislature of Nebraska passed in 1905, known as "House Roll 384", in effect April 3, 1905, and an act of the Legislature of Nebraska, passed in 1905, known as "House Roll No. 8", in effect March 9, 1905. Sections 1 to 219, inclusive, are from the act of April 3, 1905, and Sections 235 to 248, inclusive, are from the act of March 9, 1905.

Neither act has been amended or repealed since 1905 as to any matter of importance in this suit. Every portion of both acts which is important herein is reproduced verbatim in the 1907 compilation. The compilation of 1907 is in such form as to be much more simple for reference than the acts themselves in the form in which they became laws. Therefore, the compilation of 1907 is used in quoting from the act of 1905 for the purposes of this appeal.

The following sections of said chapter 12a of the compiled statutes of Nebraska, edition of 1907 (being, as above stated, sections of the aforesaid two acts of the Legislature passed in 1905), are printed in accordance with the rule of this court.

"845, Sec. 1. (*Metropolitan cities.*) All cities in the State of Nebraska heretofore incorporated as cities of the metropolitan class and all cities which shall attain a population of one hundred thousand (100,000) inhabitants, or more, shall be governed by the provisions of this act. Whenever any city shall hereafter attain a population

of one hundred thousand (100,000) inhabitants or more, and such fact shall have been ascertained by any national or state census, and shall be so certified to the governor by the mayor of such city, it shall thereupon be the duty of the governor by public proclamation to declare such city to be one of the metropolitan class, and thereupon such city shall be the subject to the provisions of this act.

(Note.—Secs. 1-219. “An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government and to repeal sections 7450 to 7649 inclusive (C. S., ch. 12a, except Secs. 123a, 175-186, 194-212) of Cobby’s Annotated Statutes of Nebraska for the year 1903.” Laws 1905, H. R. 384. In effect April 3, 1905.)

846, Sec. 2. (*Corporate limits.*) The corporate limits of such cities may be fixed and determined by ordinance, but shall be and remain as heretofore until changed or altered in accordance with the provisions of this act or of a general law governing cities and towns. Any city, town or village adjoining any city of the metropolitan class may be annexed or merged with such city of the metropolitan class, whenever a proposition for such merger has been submitted at a general election and approved by a majority of the votes cast on such proposition in each city, town or village. The terms of such propositions shall be fixed by ordinance enacted by the city of the metropolitan class and by the city, town, or village to be annexed.

899, Sec. 54. (*Park commissioners.*) In each city of the metropolitan class there shall be a

board of park commissioners, who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and city council a system of public parks, parkways and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose.

902, Sec. 57. (*Same-Lands.*) It shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds designated by said park board, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated, or purchased, as hereinafter provided, assess such real estate as may be specifically benefitted by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessment. And the mayor and council are further authorized upon the recommendation of said park commissioners and with their concurrence to purchase in the name of said city, lands, lots or grounds within the limits herein designated to be used and improved for parks, parkways, or boulevards, notwithstanding said limits include lands, lots, or grounds within

the corporate boundaries of other cities or villages, and if such lands, lots or grounds are in the limits of other cities or villages, said cities or villages shall cease to have jurisdiction over the said lands, lots or grounds after the said lands, lots or grounds are acquired for parks, parkways or boulevards as aforesaid by gift, purchase, condemnation or otherwise.

997, Sec. 140. (*Eminent domain—Waterworks system.*) The mayor and council shall have power to appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, power plants, electric light plants or water works, including mains, pipe lines and settling basins therefor, the right and power to appropriate private property for such purposes shall extend for a distance of seventy-five miles from the corporate limits of the city. They shall also have power to appropriate any water works system, plant or property already constructed to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs, and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises and they shall have power to own and operate the same. Upon condemning private property under such authority, the city clerk shall cause to be recorded an accurate plat, and a clear definite descrip-

tion of the property so taken, in the office of the registers of deeds of the county within which such city is located, within sixty days after the other legal steps for the acquisition of such title shall have been taken.

Compiled Statutes of Nebraska, Annotated, 1907.

Page 254; Chap. 12a.

“1052. Sec 194. (*Bonds.*) All bonds shall be prepared by the comptroller, signed by the mayor and countersigned and registered by the city comptroller before delivery, and it shall be the duty of the city treasurer to promptly report to the comptroller detailed statements of all receipts of money from the proceeds of the sale of bonds and to whom such bonds were sold. All bonds shall express upon their face the purpose for which they were issued, and the proceeds thereof shall not be diverted to other purposes. Each proposition for the issue of bonds required to be submitted at a general or special election must contain but one subject or purpose, and shall specify the maximum amount proposed to be issued and state distinctly the purpose thereof, and a separate vote must be required on each proposition so submitted. No bonds shall be issued for the purpose of paying salaries or the current expenses of the city. No bonds shall be sold for less than par.

1053. Sec. 195. (*Bonds, Purpose of Issue.*) The Mayor and Council are hereby authorized and empowered to issue bonds of the city with interest coupons annexed in such amounts and

for such length of time as they may deem proper, the rate of interest not to exceed five per cent. per annum, except as otherwise provided in this act, (1), for the construction and maintenance of sewers, (2), for the construction of subways or conduits, (3) for the renewal of outstanding bonds of said city, in exchange of outstanding bonds for the purpose of reducing the rate of interest, where bonds of the city permit payment before maturity, or in cases where bonds may be refunded by agreement, (4), *for the construction or purchase of a city hall, auditorium, or other needful buildings for the use of the city*, (5), for the construction of bridges, or for the construction, appropriation or purchase of gas works, *water works*, electric light plants, power plants, and lands therefor, or land for public parks, parkways or boulevards, (6) for the purpose of funding, or taking up and making payment of the floating indebtedness and liabilities of the city, but the total outstanding bonds of the city for the last named purpose shall never exceed five hundred thousand dollars (\$500,000).

1054, Sec. 195. (*Bonded Debt, Amount.*) The bonded indebtedness of such city, *exclusive of* district paving bonds, district grading bonds, curbing and guttering bonds, district improvement bonds, public library bonds, renewal bonds, *bonds issued* for the purpose of funding, or taking up and making payment of the floating indebtedness and liabilities of the city, or bonds issued for the erection or purchase of a city hall, auditorium or fire engine houses, or the construction of bridges, or for the construction and maintenance of subways and conduits, or for park purposes or *for*

the purchase, construction or appropriation of gas works, water works, electric light plants or power plants, shall not, at any time, exceed in the aggregate two million, seven hundred and fifty thousand dollars (\$2,750,000.00).

1055, Sec. 197. (*Bonds, Amount, Authorization.*) No bonds shall hereafter be issued in any one year in excess of two hundred thousand dollars (\$200,000) *except* renewal bonds, or bonds issued to be exchanged for other bonds for the purpose of reducing the rate of interest, district grading bonds, bonds for funding the floating indebtedness, and district street improvement bonds, bonds for the construction and maintenance of subways or conduits or *bonds for the purchase, construction or appropriation of gas works, water works, electric light plants or power plants or land therefor, or land for public parks, parkways or boulevards.* No bonds, except district street improvement bonds, renewal bonds and bonds in exchange for other bonds, district grading bonds and bonds for funding the floating indebtedness shall be issued until the electors of said city shall have authorized the same by a two-thirds vote of the electors of such city, voting on said proposition, at a general or special election of said city held after ten days' notice, published in the official paper of the city, stating the maximum amount proposed to be issued and stating distinctly the purpose for which they are to be issued. *Provided that bonds for water works may be authorized by a majority vote of the electors of the city, voting on such proposition at a general election or by a two-thirds vote cast on such proposition in case it shall be submitted at a special election.* (Amended April 6, 1907, H. R. 157, Sec. 10.)"

1060a, Sec. 217. (*Water board.*) Nothing in this act contained shall be so construed as to interfere with the powers, duties, authority and privileges that have been, are, or may be hereafter conferred and imposed upon the water board in metropolitan cities as prescribed by law, but in all matters relating to a water supply, or to the purchase, acquisition, construction, maintenance and management of a water works plant for such city or in any way appertaining thereto, the said powers, duties, authority and privileges of such water board so far as elsewhere conferred, imposed and defined by law shall be exclusive and paramount.

Water Works.

1076, Sec. 235. (*Water board, election, term.*) In each city of the metropolitan class, there shall be a water board consisting of six (6) members, two of whom shall be elected at the time of the general state election held in the even numbered years, but not more than one of the two members so elected shall be from the same political party. Members of said board shall hold office for a period of six (6) years from the first Tuesday after the first Monday of January following their election, and until their successors shall be elected and qualified; provided, however, that the members of the first water board shall be appointed in such manner and for such terms as hereinafter set forth. (1903, H. R. 67, Sec. 5.) Amended 1905, H. R. 8.)

(Note.—Secs. 235-248. Secs. 5-18 of "An act to provide in cities of the metropolitan class, viz.: 1. For the procedure in certain

cases, by the mayor and council in the acquisition of a municipal water plant;

2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees;

3. For penalties for interference with water plant or employees of water board in the discharge of their duties;

4. For a Water Fund, its revenues, and the disbursement and application thereof"; and amending certain sections of chap. 12a, Comp. Stats., Laws 1903, H. R. 67. In effect Feb. 2, '03. As amended by an act to amend and repeal secs. 6, 16, 17, 24, 25, 27, 29, 32, 35, 38, 41, 42, 67, 72, 89, 93, 94, 100, 101a, 101c, 122, 135, 198, 199, 200, 203, 204, 205, 208, 209, 211 of chap. 12a, C. S. 1903. "Providing in cities of the metropolitan class, as follows: 1. For the creation of a water board, its organization, its power, its duties, and the compensation of its members and employees; 2. For furnishing water by such cities for domestic, public and fire purposes without the limits thereof; 3. For a water fund, its revenues, and the disbursement and application thereof," also repealing secs. 194, 195, 196, 197 and 210, said chapter, Laws 1905, H. R. 8. In effect March 9, 1905.)

1076a. Sec. 236. (*First board, appointment.*)

The Governor shall appoint the members of the first water board, all of whom shall be electors of such city, two to serve from the date of their appointment for four years, and two from the date of their appointment for two years from the first Tuesday after the first Monday of January following the general election held in the even numbered years next after their appointment; and two to serve until said first Tuesday after the first Monday following the general election

held in the even numbered years next after their appointment. One member for each term herein designated shall be appointed from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election. Such appointments shall be made within thirty (30) days after this act shall take effect; provided, that if in any such city a *de jure* or *de facto* Water Board shall then be in existence, or shall have been in existence within six (6) months prior to such date, then, and in such case, the members of such *de jure* or *de facto* water board shall serve out their terms and continue in office until their successors shall be elected and qualified as herein provided. (*Id.*, Sec. 6, *Id.*).

1076b. Sec. 237. (*Board, vacancies, bond, salary.*) Any vacancy occurring in the water board, shall be filled, for the unexpired term by the remaining members thereof, within thirty (30) days after such vacancy shall occur, the new member to be chosen from the political party represented by his predecessor, it being the intent and purpose, but not the inducement of this act, to render said water board non-partisan in character. Before entering upon their offices, members of the water board shall give bonds for the faithful performance of their duties in the amount of Five Thousand Dollars (\$5,000.00) each, under the same terms and conditions as provided in the case of City officials in such city. The members of said board shall receive as compensation for their services, Six Hundred Dollars (\$600.00) per annum, payable quarterly by warrants drawn upon the water fund. (*Id.*, Sec. 7, *Id.*)

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1076c. Sec. 238. (*Same, meetings.*) The first meeting of the water board shall be held at eight o'clock P. M. of the first Wednesday of the calendar month next after its appointment, in an office to be provided for the use of the board by the mayor and council. Regular meetings shall be held on the first Wednesday of each calendar month thereafter at such time as the board may designate. Special meetings of the board may be held at any time at the call of the chairman, or at the request of any two members filed in writing with the secretary. (*Id.*, Sec. 8.)

1076e. Sec. 240. (*General authority and power.*) The water board shall have general charge, supervision and control of all matters pertaining to the water supply of such City for domestic, mechanical, public and fire purposes as hereinafter provided: If such City, or any portion thereof, shall be supplied with water for domestic, mechanical, public or fire purposes by any individual copartnership, or corporation, then, and in such case, said board shall have the sole power and authority to regulate and fix water rates and fire hydrant rentals; to provide for and order the extension of water mains; to determine the number and designate the location of all fire hydrants; to audit, pass upon, and pay or reject any and all bills for water or fire hydrants furnished such City; to make, modify, and terminate, on behalf of such City, all contracts for the supply of water to such City for domestic, public or fire purposes. In case such City shall undertake, or shall have heretofore undertaken the purchase or acquisition of the water plant of any person, co-partnership or corporation supply-

ing such City or any portion thereof with water for domestic, mechanical, public or fire purposes, under the powers granted by the Charter of such City or by virtue of any right inuring to such City through contract, or otherwise, or shall vote bonds for such purpose, then, and in such case, said water board shall have the sole power and authority to act on behalf of such City in all matters pertaining thereto, including the appointment of appraisers whenever required; the general supervision of any resulting appraisalment; the acceptance or rejection of any award resulting from any such appraisalment; and of all other negotiations connected with, or pertaining to the acquisition of such water plant. Provided, that no acceptance of any such appraisalment shall be binding upon such city unless bonds are voted for the acquisition of such water plant under such appraisalment. Said bonds are not to be sold for less than par and issued only in case the proposition is ratified by a majority of the votes cast upon the proposition at a general election of two-thirds or the votes cast in case the proposition shall be submitted at a special election. In case such City shall own, operate, or vote bonds for the construction of any water plant for the purpose of supplying water for domestic, mechanical, public or fire purpose, then, and in such case, said board shall have general charge, supervision and control of the design, construction, operation, maintenance and extension or improvement of any such water plant, including the power to appropriate private property therefor, and purchase and contract for necessary material, labor and supplies, and the authority and powers herein conferred upon said water board shall ex-

tend as far beyond the corporate limits of said City as said board may deem necessary. In case said board shall deem it necessary and expedient for such City to vote bonds for the acquisition, construction, extension, or improvement of a water plant to supply such City with water for domestic, mechanical, public or fire purposes, then, and in such case, said water board shall have sole power and authority to determine the amount of such bonds, and to issue the same when voted, and shall also have the power and authority to submit a proposition for voting such bonds at any regular election, or said board may call a special election for such purpose, provided twenty (20) days' public notice is given, stating distinctly the amount and purpose for which said bonds are to be issued. Said water board shall also have power and authority to maintain and defend all suits at law or in equity growing out of the transactions of said board, or any matter pertaining to the water supply of such City, or to the construction, operation, maintenance or acquisition of any water plant by such City, and said board may sue or be sued in the name of the Water Board of the City of * * * (*Id.*, Sec. 10, Amended 1905, H. R., 8).

1076g, Sec. 242. (*Water-rates-Payment-Rules Adjacent city.*) It shall be the duty of the water board and the water board shall be charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service, or the sale of water; provided, that all payments on account of water service, or the sale of water and all other receipts of the board from whatever source, shall

be received and receipted for by the city treasurer, or by an employee of the city treasurer's office, who shall be assigned by said treasurer for such purpose. Provided further, that said water board shall, from the hydrant water tax and water rates to private consumers fixed by said board, and not exceeding the water rates to private consumers now established by ordinance in any such city, provide for all expenses, interest on bonds, and sinking fund. The water board shall have authority to make such rules and regulations for the conduct of any water plant owned or operated by such city, and the use and measurement of water supplied therefrom as it may deem proper and shall also have authority to cut off any water service for non-payment or non-compliance, on the part of the water user, with the rules and regulations adopted by the board for the conduct of its business and affairs. The water board may contract with any municipality adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes; or may contract, to the same end, with any person, co-partnership, or corporation, supplying any such adjacent municipality with water for domestic, public, or fire purposes, upon such terms and conditions as said water board may deem proper; provided, however, that all water so furnished shall be measured by meter at the expense of such municipality, person, co-partnership, or corporation, as the case may be; and that the rate per thousand gallons, fixed by said water board, shall not be less than the gross average income per thousand gallons for all water furnished such metropolitan City and its inhabitants by such munici-

pal water plant; provided, further, that in computing the income from such water plant, each fire hydrant located with such metropolitan City shall be assumed to produce a reasonable revenue to be definitely fixed by said board. (*Id.*, Sec. 12, *Id.*).

NEBRASKA COMPILED STATUTES, 1907.

"6576, Sec. 6. (*Recovery of real Property-Mortgages.*) An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This action shall be construed to apply also to mortgages. Provided, however, that there shall be no limitation to the time within which any county, city, town, village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots (Amended 1869, 67; 1899, chap. 79).

COMPILED STATUTES OF NEBRASKA, 1907, p. 192.

Chapter 12a—Cities of the Metropolitan Class.

846, Sec. 2. (*Corporate limits.*) The corporate limits of such cities may be fixed and determined by ordinance, but shall be and remain as heretofore until changed or altered in accordance with the provisions of this act or of a general law governing cities and towns. Any city, town or village adjoining any city of the metropolitan

class, may be annexed or merged with such city of the metropolitan class, whenever a proposition for such merger has been submitted at a general election and approved by a majority of the votes cast on such proposition in each city, town or village. The terms of such propositions shall be fixed by ordinance enacted by the city of the metropolitan class and by the city, town or village to be annexed.

Laws of 1905, H. R. 384. In effect April 3, 1905. +

CITY OF OMAHA v. OMAHA WATER COMPANY.

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.**

No. 159. Argued April 19, 1910.—Decided May 31, 1910.

In the absence of any provision in the submission, the award of arbitrators or appraisers must be unanimous in matters of private concern, but a majority can act when the matter submitted is one which concerns the public.

The fact that public affairs are controlled by majorities is probably the basis of the above rule although the reason for the distinction therein contained is not altogether clear.

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The purchase by a municipality, under authority and direction of the legislature of the State, of a water supply system, and the determination of the price to be paid for an existing plant are matters of public concern.

There is a distinction between an arbitration and an appraisal of value and although arbitrators may not independently take testimony as to disputed facts appraisers may, as in this case, properly examine books and papers relating to the property, in the absence of counsel, without being guilty of misconduct; and, in the absence of bad faith, such examination will not vitiate the award.

The legislature of a State may authorize a municipality to purchase a water system which extends beyond the city limits and to supply water to adjacent sections; and so held that the city of Omaha has such right, and that an appraisal of a water system is not bad, and hence not binding on the city, because it includes the entire system, parts of which are beyond the city limits.

There is a presumption against an intent to dismember a complete waterworks system, and an ordinance to purchase such a system will not be construed as requiring such dismemberment, even if the city had no power to use certain portions of the system.

Cost of duplication, less depreciation, of a water system, is less than the commercial value of the system as a going concern; and, even though the value of the unexpired franchise be expressly excluded from the appraisal, where the parties contemplate the purchase of a complete water system in operation, a reasonable amount should be included in the appraisal for the "going value" over the value of the physical properties.

A transaction of great magnitude such as the purchase by a city of a water supply system will not be defeated because of minor obstacles; and if the deed tendered includes a few properties to which title is not perfect or if there are incumbrances on the properties, the court can bring the proper parties in and the deed can be modified and interests protected so as to carry out, and not defeat, the transaction.

THE facts are stated in the opinion.

Mr. John Lee Webster, with whom *Mr. Carl C. Wright* and *Mr. Harry E. Burnam* were on the brief, for petitioner:

The award is void because not concurred in by the three appraisers. The election to purchase contemplated the valuation to be ascertained by all three appraisers.

The fact that each party selected an appraiser, and these two the third appraiser, does not give the right by implication or otherwise, to two appraisers alone to make an award, and one so made is void. *Willis v. Higginbotham*, 61 Mississippi, 164; *Harvin v. Denton*, 87 Mississippi, 238; *Weaver v. Powel*, 148 Pa. St. 372; *Lowe v. Brown*, 22 Ohio St. 463; *Stose v. Heissler*, 120 Illinois, 433; *Sherman v. Cobb*, 10 Atl. Rep. 591; *Memphis & Charleston Ry. Co. v. Pillow*, 56 Tennessee, 248; *Jeffersonville Ry. Co. v. Mounts*, 7 Indiana, 669; *Patterson v. Leavitt*, 4 Connecticut, 50; *United Kingdom &c. v. Houston*, 1 Q. B. L. R. 567.

The contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all. *Richards v. Holt*, 61 Iowa, 529; *Hubbard v. Great Falls Mfg. Co.*, 80 Maine, 39; *Lowe v. Brown*, 22 Ohio St. 463; *Godfrey v. Knodle*, 44 Ill. App. 638; *Oakley v. Anderson*, 93 N. C. 108; *Mackey v. Neill*, 53 N. C. 214; *Anderson v. Farnham*, 34 Maine, 161; *Owens v. Withee*, 3 Texas, 161; *Stose v. Heissler*, 120 Illinois, 433; *United Kingdom &c. v. Houston*, 1 Q. B. L. R. 567.

All must concur in the award to make it valid unless the parties have agreed that it may be made by less than all. Unless there is such an agreement clearly and unmistakably expressed the award will be held void when signed by two and not concurred in by the third. *Leavitt v. Windsor*, 54 Fed. Rep. 439; *Harryman v. Harryman*, 43 Maryland, 140; *Byrd v. Harkrider*, 108 Indiana, 376; *Willis v. Higginbotham*, 61 Mississippi, 164; *Weaver v. Powel et al.*, 148 Pa. St. 372; *Eames v. Eames*, 41 Connecticut, 177; *Towne v. Jaquith*, 6 Massachusetts, 46; *Green v. Miller*, 6 Johns. 39; *Patterson v. Leavitt*, 4 Connecticut, 50; *Nettleton v. Gridley*, 21 Connecticut, 531; *Jeffersonville Ry. Co. v. Mounts*, 7 Indiana, 669; *Smith v.*

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Waldon, 26 Georgia, 249; *Lattin v. Gamble*, 154 Michigan, 177.

This case is distinguishable from one where the terms of the submission provide that a third party is an umpire, to be selected in the event of a disagreement. The submission in case at bar does not make the third man an umpire. *Sherman v. Cobb*, 10 Atl. Rep. 591; *Lowe v. Brown*, 22 Ohio St. 463; *Jeffersonville Ry. Co. v. Mounts*, 7 Indiana, 669; *Stose v. Heissler*, 120 Illinois, 433; *Godfrey v. Knodle*, 44 Ill. App. 638.

The case at bar is not a public appraisement which would justify an award by a majority of the appraisers. Such rule only prevails in cases of international controversies, or where the appraisers are appointed under a public law of the State and are acting in a public or quasi-judicial capacity.

Contracts between cities and water and gas companies are business contracts between private individuals. *Omaha Water Co. v. City of Omaha*, 147 Fed. Rep. 1; *Wagner v. City of Rock Island*, 146 Illinois, 139; *Illinois Trust Co. v. Arkansas City*, 76 Fed. Rep. 271; *Appeal of Brum*, 12 Atl. Rep. 855; *Safety Ins. Wire & Cable Co. v. Mayor*, 66 Fed. Rep. 140; *Cincinnati v. Cameron*, 33 Ohio St. 336.

The cases cited by the Court of Appeals to effect that this appraisement was a matter of public concern do not support that view.

A public appraisement is where the appraisers or arbitrators are appointed under a state or national law and act as quasi-public officers in the performance of a public duty. *Grindley v. Barker*, 1 Bos. & Pull. 229; *King v. Beetson*, 3 Term. 529; *Withnell v. Gartham*, 6 Tennessee, 388; *Ex parte Rogers*, 7 Cow. 525; *Sinclair v. Jackson*, 8 Cow. 543; *Young v. Buckingham*, 5 Ohio, 485; *State v. McMillan*, 29 S. E. Rep. 540; *S. C.*, 52 S. C. 60; *Carroll v. Alsup*, 107 Tennessee, 271; *Cortis v. Kent Water*

Works, 7 B. & C. 314; *Cooley v. O'Connor*, 12 Wall. 391; *The King v. Whitaker*, 9 Barn. & Cress. 648; *People v. Walker*, 23 Barb. 304; *People v. Coghill*, 47 California, 361; *Hewitt v. Craig*, 5 S. W. Rep. 280; S. C., 9 Ky. Law Rep. 232.

The award is void because after the appraisers concluded the formal hearing, they privately and against the protest of the city, received and secretly examined, *ex parte*, the books of the water company, under an understanding that the city should not be permitted to see or know the contents of said books. The question to be considered involves a moral principle. The incident complained of did not give the city a "square deal." Such an examination was misconduct and made the award void. *Callett v. Dougherty*, 114 Illinois, 568; *Emery v. Owings*, 7 Gill. 448; *Bassett v. Harkness*, 9 N. H. 164; *Jenkins v. Liston*, 13 Gratt. 535; *Rand v. Peel*, 74 Mississippi, 305; *National Bank v. Darragh*, 30 Hun, 29; *Warren v. Tinsley*, 53 Fed. Rep. 689; *Cameron v. Castleberry*, 29 Georgia, 495; *Walker v. Frobisher*, 6 Ves. 69; *Strong v. Strong*, 9 Cush. 560; *Hewitt v. Reed City*, 124 Michigan, 6; *Vessel Owners' Towing Co. v. Taylor*, 126 Illinois, 250; *Elmendorf v. Harris*, 23 Wend. 638; *Dobson v. Groves*, 9 Q. B. 637; *Western Female Seminary v. Blair*, 1 Disney, 370; *In re Plews and Middleton*, 6 Q. B. 845; *In re Tidswell*, 33 Beav. 213; *Passmore v. Pettit*, 4 Dall. 270; *Wood v. Helme*, 14 R. I. 325; *Jackson v. Roane*, 90 Georgia, 669; *Wilkins v. Van Winkle*, 78 Georgia, 557; *Rosenau v. Legg*, 82 Alabama, 568; *Knowlton v. Mickles*, 29 Barb. 465; *Sisk v. Gary*, 27 Maryland, 401; *Cleland v. Hedley*, 5 R. I. 163; *Lattin v. Gamble*, 154 Michigan, 177-181; *Lutz v. Linthicum*, 8 Pet. 165; *McFarland v. Mathis*, 10 Arkansas, 560; *Eastern Counties Ry. Co. v. Eastern Union Ry. Co.*, 68 Eng. Ch. 609.

These cases also hold that the court will not permit an inquiry into the *ex parte* evidence, but will set aside the

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award, and it was not necessary for the city to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence, but the award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

An arbitrator who takes instructions from one side is in law acting corruptly. *Strong v. Strong*, 9 Cush. 560; *Western Female Seminary v. Blair*, 1 Disney, 370.

The general rule is that valuers of property, although called appraisers, or referees, or commissioners, in receiving evidence and in making awards, are governed by the law relating to arbitration. *Continental Ins. Co. v. Garrett*, 125 Fed. Rep. 589; *Christianson v. Norwich Ins. Co.*, 84 Minnesota, 526; *Mason v. Fire Ins. Assn.*, 122 N. W. Rep. 423; *Hills v. Home Ins. Co.*, 129 Massachusetts, 345; *Washburn v. White*, 197 Massachusetts, 540; *Insurance Co. v. Hegewald*, 161 Indiana, 631; *Manf. Builders' Ins. Co. v. Mullen*, 48 Nebraska, 620; *Sherman v. Cobb*, 15 R. I. 570; *Lowe v. Brown*, 22 Ohio St. 463; *Godfrey v. Knodle*, 44 Ill. App. 638; *Stose v. Heissler*, 120 Illinois, 433; *Emery v. Owings*, 7 Gill. 448; *Redner v. N. Y. Fire Ins. Co.*, 92 Minnesota, 306; *Earle v. Johnson*, 84 N. W. Rep. 332; *Hart v. Kennedy*, 47 N. J. Eq. 51.

The award is void because the appraisers exceeded their authority in appraising and including in the award the sum of \$562,712.45 for going value. *Knoxville v. Water Co.*, 212 U. S. 1; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52.

The award includes property the city is without authority to purchase, and used only to supply other towns.

A municipality acts under delegated power and can exercise only such rights and powers as are expressly conferred or necessarily implied from express grants; and all grants of power are to be strictly construed. *Citizens' St.*

Ry. Co. v. Detroit Ry. Co., 171 U. S. 48, 53; *City of Fort Scott v. Eads Brokerage Co.*, 117 Fed. Rep. 51, 54; *State v. Irely*, 42 Nebraska, 189.

Cities have no power to levy taxes for the purpose of maintaining or to own or construct waterworks for the benefit of adjoining municipalities. *Sutherland-Innes Co. v. Village of Ewart*, 86 Fed. Rep. 597; *Ottawa v. Carey*, 108 U. S. 121; *Quincy v. City of Boston*, 148 Massachusetts, 389; *Arnold v. Pawtucket*, 21 R. I. 15; *Duluth v. Gas & Water Co.*, 45 Minnesota, 210; *Farwell v. City of Seattle*, 43 Washington, 141; *Town of Bristol v. Water Works*, 23 R. I. 274.

The only exception is where there is express statutory authority to that end. *West Hartford v. Water Commissioners*, 68 Connecticut, 323; *Pittsburg v. Brace*, 158 Pa. St. 174.

A decree of specific performance should not be entered. Such a decree will not be entered where the purchaser would only obtain an equitable title. *Wesley v. Eells*, 177 U. S. 37; *City of Tiffin v. Shawhan*, 43 Ohio St. 178; *Guild v. Atchison, Topeka & Santa Fe Ry.*, 57 Kansas, 70. A court of equity will not decree a specific performance except where the right is clear. *Willard v. Tayloe*, 8 Wall. 557, 565; *Hennessy v. Woohworth*, 128 U. S. 438, 442; *McCabe v. Matthews*, 155 U. S. 550, 553; *Hildreth v. Duff*, 148 Fed. Rep. 676.

Although the proof might not authorize the court to set aside the award, it may be sufficient for a court of equity to refuse specific performance. *Shoop v. Burnside*, 78 Kansas, 871, 876; *Banaghan v. Malaney*, 200 Massachusetts, 46.

The award fixes the value of the property as of the date of the award, while the law requires the valuation to be fixed as of the date of the election to purchase. *Bristol v. Bristol*, 25 R. I. 189; *Water Co. v. Cherryvale*, 65 Kansas, 219; *Caldwell v. Frazier*, 65 Kansas, 24; *Water Co. v.*

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Argument for Respondent.

Rockport, 161 Massachusetts, 279; *C., M. & St. P. Ry. Co. v. Stewart*, 19 Fed. Rep. 5.

Mr. Howard Mansfield and *Mr. R. S. Hall*, with whom *Mr. Herbert C. Lakin* was on the brief, for respondent:

There was no misconduct, improper procedure, concealment or secrecy on the part of the board of appraisers in the examination of the water company's books, nor were the books offered in evidence in any technical sense. The company was entirely within its rights in restricting the examination of its books to the sole purpose of the appraisal.

The board of appraisers was not subject to the rules of procedure governing arbitrations. *Lutz v. Linthicum*, 8 Pet. 165; *Bliss v. Supervisors*, 15 N. Y. Supp. 748; 1 Words and Phrases, 487, 490; *Garr v. Gomez*, 9 Wend. 649, 651; *Hall v. Norwalk Fire Ins. Co.*, 57 Connecticut, 105; *Continental Ins. Co. v. Garrett*, 125 Fed. Rep. 589.

The subject of the present review is not an arbitration but an appraisal; and the determination of the matter submitted to the board of appraisers is not an award, but an appraisement.

The vital distinction between an arbitration and an appraisal has been clearly and uniformly recognized from remote time by the courts. *Leeds v. Burrows*, 12 East, 1; *Lee v. Hemingway*, 3 Nev. & M. 860, note to *Parkes v. Smith*, 15 Q. B. 305; *Collins v. Collins*, 26 Beav. 306; *Eads v. Williams*, 4 De Gex, MacN. & G. 674; *Bottomley v. Ambler*, 32 L. T. N. S. 545; *Fry on Specific Performance*, 2d ed., § 341; *Garr v. Gomez*, 9 Wend. 649; *Garrard v. Macey*, 10 Missouri, 161; *Curry v. Lackey*, 35 Missouri, 389 (1858); *Kelly v. Crawford*, 5 Wall. 785; *G. & C. Sts. Ry. Co. v. Moore*, 64 Pa. St. 79; *Palmer v. Clark*, 106 Massachusetts, 373; *N. E. Trust Co. v. Abbott*, 162 Massachusetts, 148; *Norton v. Gale*, 95 Illinois, 533; *Stose v. Heissler*, 120 Illinois, 433; *James v. Schroeder*, 61 Michi-

gan, 28; *Noble v. Grandin*, 125 Michigan, 383; *M. E. Church v. Seitz*, 74 California, 287; *Guild v. Railroad Co.*, 57 Kansas, 70; *Wurster v. Armfield*, 175 N. Y. 256; *Norwich Gas & El. Co. v. Norwich*, 76 Connecticut, 565; *Earle v. Johnson*, 81 Minnesota, 472, distinguished; *Colombia v. Cauca Co.*, 190 U. S. 524.

The three engineers were, from the outset, regarded by the counsel for both parties, as constituting a board of appraisers and not a board of arbitrators, and by agreement of both parties were given the widest latitude of procedure.

The objection as to the examination of the books comes too late. *Drew v. Drew*, 33 Eng. Law & Eq. 9.

The appraisement cannot be set aside, except on positive proof of corruption, partiality or actual misconduct. *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337; *Brush v. Fisher*, 17 Michigan, 469.

The terms of the contract reserving to the city of Omaha the right to purchase the waterworks necessarily authorized a valuation by a majority of the board of appraisers.

The distinction between appraisements in private and in public concerns is obvious. *Colombia v. Cauca Co.*, 190 U. S. 528. The acquisition by a city of a system of waterworks is a matter of public concern. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Wagner v. Rockland*, 146 Illinois, 139; *Minneapolis Mill Co. v. Water Commissioners*, 56 Minnesota, 485. See also *Winters v. Duluth*, 82 Minnesota, 127; *Water Co. v. Eau Clair*, 132 Wisconsin, 411; *De Portibus Maris*, 1 Harg., Law Tracts, 78; *Munn v. Illinois*, 94 U. S. 113. See also *Budd v. New York*, 143 U. S. 517; *Slingerland v. Newark*, 54 N. J. L. 62; *Kennebec Water District v. Waterville*, 96 Maine, 234.

Public policy requires that in a matter of public concern the determination of a majority of the appraisers,

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where all meet to consider the matter, must be taken as the act of the whole. *Grindley v. Barker*, 1 Bos. & Pul. 229; *McCoy v. Curtice*, 9 Wend. 17; *Cowan v. Murch*, 97 Tennessee, 590, 598; *Carroll v. Alsup*, 107 Tennessee, 257, 271; *Washington v. Nichols*, 52 N. Y. 478; *Green v. Miller*, 6 J. R. 39; *Ex parte Rogers*, 7 Cow. 526, 529; *Young v. Buckingham*, 5 Ohio, 485; *Colombia v. Cauca Co.*, 190 U. S. 524; *Gas Co. v. Wheeling*, 8 W. Va. 320; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142; *Light Co. v. Montgomery*, 87 Alabama, 245.

None of the decisions cited by counsel for the city conflicts with the rule that unanimity is not necessary in matters of public concern. See *Patterson v. Leavitt*, 4 Connecticut, 50; *Harryman v. Harryman*, 43 Maryland, 140; *Lowe v. Brown*, 22 Ohio St. 463; *Hubbard v. Great Falls Mfg. Co.*, 80 Maine, 89; *Weaver v. Powell*, 148 Pa. St. 372; *Cortis v. Kent Water Works Co.*, 7 B. C. 314.

The going value of the company's system of waterworks, as distinguished from the unexpired franchise, is an integral and essential element of the appraised valuation of the property. *Water Works Co. v. Kansas City*, 62 Fed. Rep. 853; *Gloucester Water Supply Co. v. Gloucester*, 179 Massachusetts, 365; *Gas & Electric Co. v. Norwich*, 76 Connecticut, 565; *Knoxville v. Water Co.*, 212 U. S. 1; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, distinguished.

The valuation by the board of appraisers was properly made as far as practicable as of the date of their report.

By the terms of the ordinance of election the scope of the city's purchase was nothing less than the entire system of waterworks owned and operated by the Omaha Water Company, wherever located.

By the action of the parties, construing the ordinance with a view to the powers conferred by the statute, the scope of the contemplated purchase became irrevocably

fixed. It cannot now be altered. *Knox County v. National Bank*, 147 U. S. 91; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. Rep. 82. See also *District of Columbia v. Gallaher*, 124 U. S. 505, 510; *Insurance Co. v. Dutcher*, 95 U. S. 269, 273.

The city is equitably estopped from now claiming that it has never been its purpose to acquire the entire system of the complainant. *Reynolds v. Adden*, 136 U. S. 348; *Hackett v. Ottawa*, 99 U. S. 86, 96; *County of Randolph v. Post*, 93 U. S. 502, 513; *Bissell v. Jeffersonville*, 24 How. 287, 300; *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186, 197; *Brooks v. Laurent*, 98 Fed. Rep. 647; *Garber v. Doersom*, 117 Pa. St. 162; *Munroe v. Danbury*, 24 Connecticut, 199; *Tarr v. Mayor of Crete*, 32 Nebraska, 568; *Water Co. v. Omaha*, 156 Fed. Rep. 922.

An equitable estoppel may arise in such a case, applicable to a municipal corporation as well as to any other corporation or to an individual. *Water Co. v. City of Aspen*, 146 Fed. Rep. 8; *Indianapolis v. Consumers' Gas Trust Co.*, 144 Fed. Rep. 640; *Fayetteville v. Water, L. & P. Co.*, 135 Fed. Rep. 400; cases *supra* and *Peabody v. Westerly Water Works*, 20 R. I. 176.

None of the cases cited by counsel for the city is in conflict with this decision.

Upon the exercise of the option the obligation of the defendant to complete the purchase became absolute and the question cannot be raised as to power to purchase. *Castle Creek Water Co. v. City of Aspen*, 146 Fed. Rep. 8; *Water Co. v. Braintree*, 146 Massachusetts, 482; *Fayetteville v. Water, Light & Power Co.*, 135 Fed. Rep. 400; *Ralls County Court v. United States*, 105 U. S. 733; *Sala v. New Orleans*, 2 Woods, 188.

No valid equitable considerations appear against a decree of specific performance being entered as directed by the Circuit Court of Appeals.

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MR. JUSTICE LURTON delivered the opinion of the court.

This is a bill seeking the specific performance by the city of Omaha of a contract for the purchase and sale of the system of waterworks owned by the appellee company. The waterworks plant in question was constructed in pursuance of legislative authority and municipal ordinance, which need not be considered, for neither party questions the sufficiency of either. The fourteenth section of the ordinance of 1880, under which the waterworks were constructed by the predecessor of the appellee, was in these words:

"The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said waterworks at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company and these two to select the third: *Provided*, That nothing shall be paid for the unexpired franchise of said company."

In 1903 the city elected to exercise this option and a board of appraisers was appointed, one by each of the parties and a third by the two so selected. This board of appraisers organized and proceeded to take evidence, and, after considering the matter for about three years, made an appraisal, fixing the value of the system at \$6,263,295.49. The appraiser appointed by the city did not concur. The city rejected the award. Whereupon the company filed this bill, which, upon final hearing, was dismissed upon the sole ground of misconduct of the appraisers, other objections not being passed upon. Upon appeal this decree was reversed and the cause remanded for a decree in pursuance of the opinion of the appellate court. 162 Fed Rep. 232.

The case is here upon a writ of certiorari allowed at a former term.

Three major objections have been urged against the appraisement. First, that it was not concurred in by all; second, that the appraisers heard certain evidence without notice or giving the city an opportunity to hear or rebut; and, third, that the property valued includes a distributing system beyond the corporate limits of Omaha, by which certain suburban villages are supplied, and that to that extent the city made no contract to buy, and if it did, had no power to do so.

These in their order:

1. The only matter to be determined was the value of the waterworks system, which had long served the public. Its construction had been authorized by legislative enactment under which the municipal ordinance was passed. One section of this ordinance provided that the city at the end of twenty years might, at its election, purchase the works at a value to be determined by appraisers. The contention is that the refusal of one of the appraisers to concur in the valuation fixed by the majority defeated the appraisal. The matter in question was in no proper sense an arbitration. The contract was in all of its terms agreed upon. One party was to sell and the other to buy at a valuation determined by the board of appraisers, and unanimity was not stipulated for. Unanimity was hardly to be expected in a board made up as this was. When a matter of purely private concern is submitted to the determination of either arbitrators or appraisers the rule seems to be that there must be unanimity of conclusion by such board, unless otherwise indicated by the terms of the submission. *Hobson v. M'Arthur*, 16 Pet. 182, 192; *Green v. Miller*, 6 Johns. 39; *Gas Company v. Wheeling*, 8 W. Va. 320, 351 *et seq.* The rule is, however, otherwise when the submission is one which concerns the public. In such submissions, whether it be the arbitration of a difference or the ascertainment of a value, a majority may act, unless otherwise indicated by the agreement for

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submission. Why this distinction should exist is not altogether clear. In both instances the persons to whom the submission is made are acting under a power and must stay within it. The reason probably lies in the fact that public affairs are controlled by majorities, and, by analogy, a majority should control when the submission is a matter which concerns the public. But whatever the reason, so are the authorities. *Colombia v. Cauca Co.*, 190 U. S. 524; *The People ex rel. v. Nichols*, 52 N. Y. 478; *Gas Company v. Wheeling*, 8 W. Va. 320; *Grindley v. Barker*, 1 Bos. & Pul. 229.

The construction and acquisition of a system of water supply and distribution was a public municipal function. The Nebraska legislature, in 1903, went so far as to require municipal ownership of a water supply system in the city of Omaha, and that this should be accomplished either by construction or by the purchase of the existing system. The city, in compliance with and in the exercise of the power conferred when the existing plant was constructed, elected to purchase the existing system under the ordinance of 1880 and the power therein reserved. That in such circumstances the determination of the price to be paid by a submission was a matter of public concern, is too clear for argument. The cases cited above cover the point. The appraisal was not therefore defeated because not concurred in by all.

The distinction suggested by counsel that the authority for the submission must come from the public, if there be anything of substance in it, does not prevent the operation of the rule here, for the purchase upon a valuation settled by appraisers was in the ordinance of the city, in pursuance of legislative authority, and, in a very true sense, was an authority to submit to appraisers which came from the public.

2. The next objection is that the appraisers heard evidence in the absence of the city and without opportunity

to reply, and that this was such misconduct as to vitiate the valuation. As already hinted, this was not a board of arbitrators. An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference. But when, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate.

Counsel have cited and pressed upon us the case of *Continental Insurance Co. v. Garrett*, 125 Fed. Rep. 589, as a case where an appraisement of a fire loss was set aside because evidence was heard in the absence of the parties. But that was a case where the full amount of the insurance was claimed as the extent of the loss. This was denied. It was therefore a plain case of the submission of a dispute or difference which had to be adjusted. The rule applicable to a judicial proceeding therefore applied. It was in fact an arbitration, though the arbitrators were called appraisers. The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value. The case is wholly unlike the one here presented.

In *Collins v. Collins*, 26 Beav. 306, where there was a contract for the sale of a brewery at a price to be fixed by persons called arbitrators, one chosen by each party and a third by these two, before entering upon valua-

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tion; it was ruled that they were not arbitrators but appraisers, and the Master of the Rolls, Sir John Romilly, said:

"But I do not think that in this particular case the fixing of the price of the property is an arbitration, in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them. It might be, that if the purchaser knew the price required by the seller, there would be no difference, and that he would be willing to give it. It may well be, that if the vendor knew the price which the purchaser would give, there would be no difference, and that he would accept it. It may well be, that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. Undoubtedly, as a general rule, the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest, and in that sense it may be said that an expected difference between the parties is to be implied in every case, but unless a difference has actually arisen, it does not appear to me to be an 'arbitration.' Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, they say, 'we will refer this question of price to A. B., he shall settle it,'

and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an 'arbitration,' in the proper sense of the term, and within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbitration."

In the present case there was not only no antecedent disagreement as to price, but the ordinance under which the purchase was to be made provided that the property was to pass "at an appraised valuation, which shall be ascertained by the estimate of three engineers," etc. The board was accordingly made up of such engineers selected because they were experts of experience in the service they were expected to perform. That it was the understanding that these engineers were to examine and estimate the value and acquaint themselves with the condition and extent of the property in question in their own way and not according to the procedure required in a judicial proceeding, is made clear by the avowals made by the counsel representing the parties at the beginning of the valuation. Thus the attorney for the city, addressing the valuers, said:

"As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the city of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of the property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the city of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition

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of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the city of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, (to) whose judgment the question of value must be submitted upon the examination of the property."

Counsel for the water company appear to have fully concurred in this view of the function of the board.

That the great bulk of the evidence was heard or submitted in the presence of counsel representing both sides is true. This course did not, however, preclude them from enlightening their judgment as experts by either personal inspection or by informing themselves in any other way of the value of the plant in question without calling in counsel if they desired further information. The thing complained of is that the valuers called upon the company for their books and that they had these books gone over by an expert auditor of their own selection. This, counsel say, was done without notice to the city and after the close of the hearings. But it was not done secretly, for the city learned of it and asked an opportunity to be present when the books were submitted. What information was derived from the books is not shown. We have only the lone fact that the appraisers of their own motion asked an opportunity to look over and have audited the company's books, and that the company granted the privilege as "confidential information" for the use of the appraisers only. Neither are counsel justified in saying that the books were called for after the matter was in the hands of the appraisers for conclusion. When the parties had submitted their maps, plats, blue prints and such other evidence throwing light upon the value of the plant, as they desired, and had been heard in argument and upon brief, the chairman of the board said in substance to

counsel that much time would be necessary to reach a conclusion; that the real work of valuation had been but begun, and that "much more information must be sought by this board."

There is not the slightest evidence in the record of partiality, bad motive or misconduct affecting the action of the board. Its members appear to have been gentlemen of high character professionally and otherwise, and if their conclusion is to be set aside it must be because they deemed it within their power to have a confidential examination made of the books of the company to assist them in arriving at a valuation.

If this was a technical arbitration of a matter of dispute or difference between the parties, to be heard and decided upon evidence submitted, the examination of the company's books without the consent of the city or the presence of its representatives would be such misconduct as would vitiate the award. In such a matter the rules relating to judicial inquiry would apply. *Continental Insurance Co. v. Garrett*, 125 Fed. Rep. 589, and cases cited. But in an appraisalment, such as that here involved, the strict rules relating to arbitration and awards do not apply, and the appraisers were not rigidly required to confine themselves either to matters within their own knowledge or those submitted to them formally in the presence of the parties; but might reject, if they saw fit, evidence so submitted, and inform themselves from any other source, as experts who were at last to act upon their own judgment. *Kelley v. Crawford*, 5 Wall. 785, 790; *Railway Co. v. Moore*, 64 Pa. St. 79, 91; *Palmer v. Clark*, 106 Massachusetts, 373, 389; *M. E. Church v. Seitz*, 74 California, 287; *Curry v. Lackey*, 35 Missouri, 394.

In the absence of any evidence of actual bad faith we do not hesitate about agreeing with the Circuit Court of Appeals in the conclusion that there was no such misconduct as to vitiate the valuation.

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3. The next contention is that the valuation includes property not within the submission, and which the city did not have power to buy. The point from which the water was taken by the existing water plant was beyond the corporate limits of Omaha. In the immediate suburbs of the city there are several villages outside the corporate limits. The distributing system of the Omaha Water Company has, from time to time, been extended to these outlying suburban towns. It is now said that the appraisers have valued these outlying distributing systems as a part of the plant to be acquired by the city under the ordinance electing to purchase.

As to the power of the city: The charter, § 27, Laws of Nebraska 1897, page 99, provided for the construction and maintenance of waterworks "either within or without the corporate limits of the city." This is said to only allow the location of pumping works or source of supply outside the city. The city does not therefore object to valuing the supply station and mains extending to the city as within the contemplated purchase. But it is said that the authority is limited to a distributing system wholly within the corporate limits. That the primary purpose was to supply the people of Omaha with water for public and private purposes is clear. But does that forbid that those who live outside may not be also supplied from the main plant, and, if necessary, by such extensions, not inconsistent with the primary object, as may prove desirable as suburbs grow up around the city?

These powers were supplemented by the charter of 1897. Under § 27 of that charter it was given, among other things, "power to appropriate any waterworks system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying within said city or in part without the city and within ten miles from the corporate limits of such city, including all real estate, buildings,

machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of or connected with said system, plant or property, and franchises to own and operate the same, if any." This was again supplemented by the act of 1903, chapter 12, providing a method of procedure for acquiring municipal water plants and the creation of a water board for their control and management, being the act under which the city was required to take steps to acquire its own water plant system. Again, by the act of 1907, chapter 12a, it is, among other things, provided by § 242, that the water board may contract with any municipality adjacent to said city to supply such municipality with water for domestic, mechanical, public or fire purposes, a provision plainly contemplating just such a condition as would ensue if the city should acquire the existing system of works with a distributing system extending to villages adjacent. The review of the legislation touching the power of the city, and the conclusion of the Circuit Court of Appeals from that legislation, that the city had the power to acquire the system as it existed, and has the power to operate so much of it as is intended to supply the suburban towns adjacent which may be acquired, is full and satisfactory, and meets our approval.

We are also satisfied with the conclusion of the Circuit Court of Appeals that the acquisition of the system as it existed at the time the city made its election to purchase was within the contemplation of both the city and the water company, and that the valuation of the system as an entirety was the matter which the appraisers were required to do. What we shall say upon this point will support our conclusion as to the power of the city, for the legislation upon that matter must be read in the light of the subject-matter and of all the known local conditions. The most weighty fact in this connection is, that the system was one single system, having a common source

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of supply and common main connections therewith. Its dismemberment is not to be thought of unless it is clear that the ordinance exercising the option is so plainly limited to the purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning. A presumption against dismemberment is not overthrown even if the city had no power to sell water to people or municipalities beyond its limits. If these outside distributing pipes could not be lawfully used by the city for the purpose for which the water company had used them, it does not follow that a contract to buy would be thereby any the less a contract to buy the plant as a unitary system. Aside from contract obligation which may pass with the plant, the city might cut off the supply of water to such outlying environs, if it saw fit, whether it could or could not legally supply water through the distributing pipes which had theretofore reached them. Certain it is that as the several towns adjacent had no source of supply, no pumping station of their own, disintegration would leave the water company with no means of supplying them with water. The distributing pipes under ground would, separated from the ownership of the pumping station, reservoir, filling, or settling basins, necessarily lose much of the value which attached to them as a part of a going plant.

The reservation in the ordinance under which the works were constructed should be read and interpreted in the light of the almost certain extension of the plant as the expansion and growth of the city might demand. The city, at the time the ordinance was passed, had some thirty thousand people. When the election to buy the plant was made it had, approximately, four times as many. As is usual in respect of growing cities, there had grown up around it groups of population, which, in some cases, expanded into semi-dependent municipalities. Con-

nected by continuous streets and car lines, they made one large community, and constituted greater Omaha. The water company, as was obviously expected from the beginning, expanded with Omaha and met the public necessities by including these outside populations within its distributing system.

The appraisers in making their estimate of valuation included \$562,712.45 for the "going value." This separation of an element contributing to the value of each tangible part was done because required to be done under an order made in the Circuit Court in a suit in which the water board of the city of Omaha was complainant and the members of the board of appraisers and the water company were defendants. The object of that suit was to instruct the appraisers in respect to the mode and manner in which they should proceed. An order resulted which required the board to report the separate elements making up the aggregate value of the plant.

The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That kind of good will, as suggested in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the

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commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks v. Kansas City*, 62 Fed. Rep. 853, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned Justice, and shall not try to. That case has been approved and followed in *Gloucester Water Co. v. Gloucester*, 179 Massachusetts, 365, and *Norwich Gas Co. v. City of Norwich*, 76 Connecticut, 565. No such question was considered in either *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, or in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19. Both cases were rate cases, and did not concern the ascertainment of value under contracts of sale.

Aside from the errors pointed out in the petition for the writ of certiorari counsel have suggested certain difficulties before a final decree, which are not disposed of in the opinion or decree of the Circuit Court of Appeals. The Circuit Court had dismissed the bill. The Circuit Court of Appeals considered and decided all of the large questions which were involved under the bill, but did not direct the precise form of the decree which the Circuit Court should enter, and remanded the case with direction to reverse the decree dismissing the bill, and to proceed in accordance with the opinion. Referring to certain matters left open, the court, in its opinion, said:

"In a transaction of this magnitude there will always be encountered minor obstacles that will readily yield to business methods. What the parties cannot agree upon the trial court has full power to determine according to principles of right and justice. We refer here to such contentions as that there are two or three properties in the city of Omaha belonging to the company but not needed in the business, and also that there are supposed defects in its title to other properties. The latter are not of great importance in comparison with the magnitude of the entire system. The property not needed was ap-

praised separately and it can be excluded from the sale, and the trial court can determine whether the title to other properties is defective. It is not necessary that the title of the company to all the lands upon which its works are built or through which its pipes are laid should be a fee simple, perfect in every particular and subject to no criticism. An irrevocable license, for instance, would be sufficient, or a title based upon prescription. If, however, there should be found substantial defects opportunity should be given the company to remedy them, and if it is unable to do so the parts of the property so circumstanced can be valued and the purchase price abated accordingly. It would be expressing too narrow a view to say that an appraisal of a great system of waterworks under a contract of purchase must fail because the title to a small part not vital to the integrity of the system was afterwards found to be defective. That the deed tendered by the company was not such as the city was required to take is immaterial. It is sufficient that the company was able, ready and willing to do what might lawfully be required of it. At some time during the progress of the cause in the trial court the trustees of the mortgages should be made parties to the end that the precise amount of outstanding bonds may be ascertained and paid and the liens discharged concurrently with payment by the city of the purchase price. Doubtless the company will have to use the proceeds of sale in paying its mortgage indebtedness. Or if an arrangement is desired such as was made in the Kansas City case, whereby the mortgages are assumed by the city, and the company released from liability, the presence in the case of the trustees would facilitate it.

"The decree is reversed and the cause is remanded with direction to proceed to decree in accordance with the views expressed in this opinion."

We do not feel ourselves under any obligation to do

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more than to hold that we find no error in the decree of the Circuit Court of Appeals and to remand the case to the Circuit Court to be proceeded with accordingly.

Affirmed.